TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 254

THOMAS HAMMERSCHMIDT, LOTTA BURKE, CHARLES THIEMANN, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 26, 1923

CERTIORARI AND RETURN FILED JUNE 6, 1923

(28,474)

(29,474)

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INDEX

Judd & Detweiler (Inc.), Printers, Washington, D. C., September 13, 1923

[fols. 1-3] **UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION**

Record

[fol. 4] IN UNITED STATES DISTRICT COURT

In the District Court of the United States of America for the Southern District of Ohio, Western Division, of the October Term, in the Year Nineteen Hundred and Seventeen.

No. 1192

UNITED STATES OF AMERICA, Plaintiff

vs.

THOMAS HAMMERSCHMIDT, LOTTA BURKE, CHAS. THIEMANN, FRANK Reis, Fred Schneider, William Gruber, Alexander J. Feldhaus, Joseph Geier, Phil. Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn, and Alfred Welker, Defendants.

INDICTMENT RETURNED—October 30, 1917.

First Count, Section 37, Penal Code.

The Grand Jurors for the United States of America duly empaneled and sworn in the District Court of the United States for the Western Division of the Southern District of Ohio, at the October [fol. 5] Term thereof, in the year nineteen hundred and seventeen, and inquiring for that division and district, upon their oaths and affirmations present:

That on or about, to wit, the twenty-seventh day of May, in the year nineteen hundred and seventeen, in the City of Cincinnati, in the State of Ohio, and in the Western Division of the Southern Judicial District of Ohio and within the jurisdiction of this Court, Thomas Hammerschmidt, Lotta Burke, Charles Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander J. Feldhaus, Joseph Geier, Philip Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn and Alfred Welker, in this indictment hereafter called defendants, did then and there knowingly, willfully and unlawfully conspire, combine, confederate and agree together among themselves and with each other and with divers other persons to said Grand Jurors unknown, to defraud the United States by impairing, obstructing and defeating a lawful function of the Government of the United States, to-wit, the registration for military service of all male persons between the ages of twenty-one and thirty, both inclusive, as provided by the Act of Congress passed May 18, 1917, entitled "An Act to authorize the President to Increase Temporarily the Military Establishment of the United States" and the lawful proclamations

and regulations promulgated under the provisions of said Act, by printing, or having printed, and publishing, displaying and distributing or having published, displayed and distributed in various places and to various persons in said district, especially to male persons between the ages of twenty-one and thirty, both inclusive, hand bills, circulars, dodgers, and other literature, composed, printed, intended and designed for the purpose of counseling, advising, aiding and procuring said persons, especially said male persons between the ages of twenty-one and thirty, both inclusive, to evade, and refuse to obey the requirements of said Act of Congress, by which said Act and the proclamations and regulations promulgated thereunder, said persons were required to present themselves for and submit to registration under the provisions of said Act and the proclamations and regulations promulgated thereunder.

And the Grand Jurors further present that to effect the object of said conspiracy and in furtherance thereof the said Thomas Hammerschmitt and Lotta Burke did, on or about the twenty-seventh day of May, in the year nineteen hundred and seventeen, for themselves and the other defendants herein, order from the Queen Card [fol. 6] Company, a partnership composed by Thomas A. Foster and Floyd H. Kelley, which said partnership was then and there engaged in the printing business in said City of Cincinnati, Hamilton County, Ohio, aforesaid, the printing of a certain lot of fifty thousand hand bills, circulars or dodgers, which said hand bills, circulars or dodgers were each in the letters, figures, form and style as the following, which is an exact copy and is inserted herein and made a part of this indictment:

(Here follows reproduction of side folio page 7.)

[fol. 8] And the Grand Jurors also present that to further effect the object of said conspiracy the said Lotta Burke, and other persons the exact names and number of whom is unknown to this Grand Jury, on or about, to wit, the thirty-first day of May, in the year nineteen hundred and seventeen, called for and received about eighteen thousand of the above described lot of handbills, circulars and dodgers from the said The Queen Card Company, with the intent and for the purpose of distributing and publishing said handbills, circulars and dodgers, and causing the same to be distributed and published as aforesaid.

And the Grand Jurors also present that to further effect the object of said conspiracy the said Charles Thiemann, on or about, to-wit, the first day of June, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton, and State of Ohio, and within the jurisdiction of this Court, did publish, distribute and give away to one Susan Jeffries, and to various other persons unknown to this Grand Jury, by leaving at the residence of said Susan Jeffries and said various other persons, copies of the aforesaid handbill or circular beginning "Down With Conscription," a copy of which is hereinbefore inserted and made a part of

DOWN WITH CONSCRIPTION

The First Amendment to the Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of SPEECH, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The 13th Amendment to the Constitution of the United States reads:

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any places subject to their jurisdiction."

CONSCRIPTION IS THE WORST FORM OF INVOLUNTARY SERVITUDE

The conscription law which the Wilson administration intends to put into effect proposes that the young men of this nation shall be taken from their homes against their will, and sent to the trenches of France to murder and be murdered in the war over the commercial interests of the capitalist class.

Daniel Webster, one of the greatest American statesman, said this of conscription, in Congress of this county, December 9, 1814:

"Is this consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No, sir, it is not. The constitution is libeled, foully libeled. The people of this country have not established for themselves such a fabric of despotism They have not purchased at a vast expense of their treasures and their own blood a Magna Charta to be slaves. Where is it written in the constitution, in what article or section is it contained, that you may take children from their parents.....compel them to fight the battles of any war in which the follies or the wickedness of the government may engage? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect to trample down and destroy the dearest right of personal liberty."

Every man who is determined to uphold the "dearest right of personal liberty," every man who refuses to become a victim of the war declared by the government to protect the millions loaned the Allies by the capitalist of this country, should

REFUSE TO REGISTER FOR CONSCRIPTION

The Socialist party of Ohio has shown the way in the fight against conscription by adoption of this resolution:

"Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing "involuntary servitude," in violation of the thirteenth amendment of the constitution of the United States, in the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the party, and the workers generally that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class.

One of the millions of leaflets issued by the Socialist Party
SOCIALIST PARTY OF OHIO—[illegible]2 Cook Ave., Lakewood, O.

1291

this indictment and to which inserted copy, for brevity and further particularity, reference is hereby made.

And the Grand Jurors also present that to further effect the object of said conspiracy the said Frank Reis, on or about, to-wit, the first day of June, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton, and State of Ohio, and within the jurisidction of this Court, did publish, distribute and give away to one Henry J. Dickhouse, and to various other persons unknown to this Grand Jury, copies of the aforesaid handbill or circular beginning with "Down With Conscription" a copy of which is hereinbefore inserted and made a part of this indictment and to which inserted copy, for brevity and further particularity, reference is hereby made.

And the Grand Jurors also present that to further effect the object of said conspiracy the said Walter Gregory, on or about, to-wit, the first day of June, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton, and State of Ohio, and within the jurisdiction of this Court, did publish, distribute and give away to one William Steele, and to various other persons to these Grand Jurors unknown copies of the aforesaid handbill or circular beginning "Down With Conscription," a copy of which is hereinbefore inserted and made a part of this indictment and to which inserted copy, for brevity and further particularity, reference is hereby made.

[fol. 9]

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Stuart R. Bolin, United States Attorney for the Southern District of Ohio.

In United States District Court

Motion to Quash—Filed December 5, 1917

Defendants in the above entitled cause, having heard said indictment read, and withdrawing their pleas of not guilty heretofore entered, move to quash said indictment for the following reasons, to-wit:

1. The grand jury which found said indictment was not drawn and impanelled as required by law.

2. Said grand jury was not legally constituted and was not a lawful grand jury.

3. The drawing of venire for said grand jury was done in private without any public notice of time and place, or other opportunity for those defendants or their counsel to be present.

4. Said drawing was done in the private office of the Clerk of Court by Thomas W. Allen, Commissioner and Harry F. Rabe,

Deputy Clerk; said office being an interior room, not generally used by the public.

5. The names of all persons selected for jury service in this Court and placed in the jury-box were selected from persons residing within the Western Division of the Southern District of Ohio, instead of from the entire District as required by the Constitution.

6. The names drawn for said grand jury were not from all counties within said District but from only the eighteen counties within the [fol. 10] Western Division thereof.

7. The said names were drawn not from a jury box as provided by law, but from bundles of slips bound with elastics and placed within said box, each bundle containing fifty names from one county.

8. Except for said bundles of slips, each containing fifty names, there were not in said jury box the required number of at least three hundred qualified names at the time of the drawing.

9. The names selected and put in and the names drawn from the jury-box have not included names from the wage earning class which is a very large class within the district and to which class these defendants belong. By the exclusion of names from said class, these defendants are deprived of the right of trial by a jury of their peers.

10. The names selected and put in the jury-box were so selected and put by two men appointed for that purpose solely on political consideration and because of their prominence in partisan politics as members of the largest two political parties of this judicial district, to wit, the Republican and Democratic parties. The defendants are members and officers of the Socialist party, a minor political party in said district, which was and is without representation on said jury commission. The offenses charged were, if committed by these defendants, a part of their activities as Socialists and part of their propaganda to defeat said Republican and Democratic parties at the polls and deprive partisans of said parties of political office. The platforms and principles of said Republican and Democratic parties are opposed to the platform and principles of said Socialist Party, and said jury commissioners as partisans aforesaid are and of necessity must be opposed and hostile to and prejudiced against these defendants.

11. The names selected and put in said jury-box were names exclusively of adherents of said Republican and Democratic parties, and members of the Socialist Party are and have been by reason of their adherence to said party excluded from such jury service. All the persons whose names were so selected and put were and are, by reason of their said adherence to the Republican and Democratic parties and for other reasons, hostile to and opposed to and prejudiced against these defendants as members and officers of the Socialist Party. All the persons whose names were drawn for said grand jury are adherents of said Republican and Democratic parties [fol. 11] and hostile and opposed to and prejudiced as aforesaid, and

because of their hostility to and prejudice against the propaganda of the Socialists, involved in the charges made against these defendants, and because of the fierce denunciation of Socialists by prominent politicians and newspapers identified with the Republican and Democratic parties, and because of the political passions aroused by the war, said persons so drawn are at this time incapable of rendering a just and impartial verdict with regard to the actions of these defendants as Socialists. That to permit defendants to be indicted by a grand jury composed exclusively of their political adversaries will deprive them of the equal protection of the law and their constitutional rights.

12. The Marshal and his deputy who served the writ of venire were not "indifferent persons," as required by law, but active adherents of the Democratic Party and political adversaries of these defendants and opposed to their propaganda and personally interested in having said propaganda suppressed.

13. All persons outside the City of Cincinnati were summoned by mail instead of due process of law, and without any of the precautions for identification required by the common law.

14. These defendants further say that on the summoning of said grand jury and before the swearing in of said grand jury, they filed in this Court, a Challenge to the Array of said grand jury on the foregoing and other grounds which said Challenge was overruled.

15. Said indictment fails to set forth any conspiracy to do any act of defrauding the United States, to support the charge of defrauding therein.

16. Said indictment fails to set forth any overt act on the part of defendants showing an intent to defraud the United States or made for the purpose of carrying out any conspiracy to defraud the United States.

And this they are ready to verify.

Wherefore they pray judgment of the said indictment and that the same may be quashed.

Jos. W. Sharts, Ed. F. Alexander, Nicholas Klein, Attorneys for Defendants.

STATE OF OHIO,
County of Hamilton, ss:

Thomas M. Hammerschmitt, being first duly sworn, says that he is one of the defendants named in the above Motion to Quash; and [fol. 12] that the allegations therein contained are true as he verily believes.

Thos. M. Hammerschmitt.

Sworn to before me and subscribed in my presence this 4th day of December, A. D. 1917. Ed. F. Alexander, Notary Public, Hamilton County, Ohio.

IN UNITED STATES DISTRICT COURT

OPINION ON MOTION TO QUASH THE INDICTMENT—Filed May 27, 1918

The first fourteen grounds of the motion have to do with the method of drawing grand jurors and petit jurors. These matters were considered and disposed of when the challenge to the array was overruled. It is unnecessary now to set the facts out in detail. These, including matters of which the court will take judicial notice, will appear if a bill of exceptions is required in this case. As to these grounds the motion will be overruled.

The 15th and 16th grounds of the motion are:

"15. Said indictment fails to set forth any conspiracy to do any act of defrauding the United States, to support the charge of defrauding therein.

16. Said indictment fails to set forth any overt act on the part of defendants showing an intent to defraud the United States or made for the purpose of carrying out any conspiracy to defraud the United States."

While there are important cases holding that a conspiracy to defraud must necessarily involve some artifice, trick, or fraudulent scheme, yet in view of decisions by the courts of the United States, it must be held, to quote the language of Mr. Justice Lurton in Haas vs. Henkel, 216 U. S. 472, 479, that—

"The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the [fol. 13] lawful function of any department of government."

The last deliverance by the supreme court on the subject was in United States vs. Barnow, 239 U. S. 74, 79, in which it was said by Mr. Justice Pitney, citing Haas vs. Henkel:

"It has been held that in an indictment under Section 5440, Rev. Stat., for a conspiracy to defraud the United States, it is not essential that the conspiracy shall contemplate a financial loss, or that one shall result; and that the statute is broad enough to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any Department of the Government."

See United States vs. Plyler, 222 U. S. 15 and United States vs. Gradwell, 234 Fed. 446, 447 (D. C.), affirmed by the supreme court, 243 U. S. 476.

It is now, therefore, held that the indictment, if otherwise good, charges an offense to defraud the United States within the meaning of Section 37 of the Criminal Code (Section 5440 Rev. Stat.) That section reads:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any

act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The crime of conspiracy at common law is not the same as the offense defined by this statute, so that to some extent at least decisions dealing with the common law offense and with the means by which the conspiracy is to be accomplished and the overt acts by which it is to be carried into effect, are confusing rather than helpful. The supreme court itself did not at first fix the definition to the entire satisfaction of the court, for in United States vs. Britton, 108 U. S. 199, 204, Mr. Justice Woods said:

"This offence does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone."

While it was said by Mr. Justice McKenna in Hyde vs. United States, 225 U. S. 347, 359:

"The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execu-[fol. 14] tion or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction."

In the recent case of Joplin Mercantile Co. vs. United States, 236 U. S. 531, 535, 536, it was said by Mr. Justice Pitney:

"But the averment of the making of the unlawful agreement relates to the acts of all the accused, while overt acts may be done by one or more less than the entire number, and although essential to the completion of the crime, are still, in a sense, something apart from the mere conspiracy being 'an act to effect the object of the conspiracy.'"

Therefore, it was held, as it had been in Hyde vs. Shine, 199 U. S. 62, 76, and Hyde vs. United States, 225 U. S. 347, 359, that the overt act done to effect the object of the conspiracy was a necessary part of the offense and without it a mere conspiracy is not punishable under this section.

But it is clear that an indictment for conspiracy must contain that charge complete and distinct in itself as well as the statement of the separate overt act done to carry the conspiracy into effect. Necessarily that act follows the completed conspiracy, and it was so held by Judge Munger in United States vs. Richards, 149 Fed. 443, 446.

Hence it is that the conspiracy must be sufficiently charged and cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. United States vs. Britton, 108 U. S. 199, 205. Of course, other necessary description, found in overt acts charged, might be incorporated, by appropriate reference, in the statement of what the conspiracy

was, but otherwise the charge of conspiracy must stand or fall by itself. It was said in Joplin Merc. Co. vs. United States, 236 U. S. 531, 536:

"Where, as here, the averment respecting the formation of the conspiracy refers to no other clause for certainty as to its meaning, it should be interpreted as it stands."

This indictment charges a conspiracy to defraud the United States by defeating a lawful function of the Government, to-wit: the registration for military service of all persons between the ages of twenty-one and thirty, both inclusive, as provided by the Act of Congress of May 18, 1917, by printing, etc., and publishing, etc., in various [fol. 15] places and to various persons, especially to male persons within the draft age, circulars, etc., composed, printed, intended and designed for the purpose of counselling, advising, aiding and procuring "said persons, especially said male persons" within the draft age, to evade, etc., the Act by which said persons were required to register. This is the substance of the charge.

It may be that at common law, circumstances determine whether or not it is necessary to allege the means by which a conspiracy is to be accomplished. But it is manifest that in a charge of this kind it is necessary that the means be set forth by which the United States was to be defrauded. But were it not necessary, yet the pleader has set forth the means with great particularity and it is clear that the conspiracy includes the means as a part of it. The agreement was that the lawful end was to be accomplished by doing certain things, which included the printing and publishing of circulars, etc., composed and designed to have a certain influence and effect upon persons within the draft age as well as "various persons." The charge does not set out the circular, etc., agreed to be printed and published, nor does it refer to any clause where it may be found, and we have nothing in the charge itself from which to determine whether or not the circular could have the effect alleged or not, whether as to persons within the draft age, or as to "various persons," whatever that description may mean. The indictment sets out the pleader's conclusion, but fails to set out that from which his conclusion is drawn. The circulars, etc., designed and composed, as set forth, were a part of the conspiracy itself and the charge of conspiring is not complete until the entire agreement is set forth. Hence it would seem, logically, that the first part of the offense—the conspiracy—is not sufficiently alleged. It is true that in that part of the indictment stating the alleged first overt act we find a printed circular inserted and "made a part of this indictment," but there is nothing to show that that circular is the circular, etc., alleged in the charge of conspiracy to have been composed, printed, etc., advising evasion of the draft law.

The first overt act charged reads:

"And the Grand Jurors further present that to effect the object of said conspiracy and in furtherance thereof the said Thomas Hammerschmidt and Lotta Burke did, on or about the twenty-seventh day of May, in the year nineteen hundred and seventeen, for them-

selves and the other defendants herein, order from the Queen Card [fol. 16] company, a partnership composed by Thomas A. Foster and Floyd H. Kelly, which said partnership was then and there engaged in the printing business in said City of Cincinnati, Hamilton County, Ohio, aforesaid, the printing of a certain lot of fifty thousand hand bills, circulars or dodgers, which said hand bills, circulars or dodgers were each in the letters, figures, form and style as the following, which is an exact copy and is inserted herein and made a part of this indictment."

It is also true that ordering that circular is alleged to be "to effect the object of said conspiracy and in furtherance thereof," but it cannot be said certainly that the circular ordered was the same as that alleged to have been agreed upon. It may or may not be the same. The mere fact that it is made a part of the indictment does not so connect it with the charge of conspiracy as to make it a part of that charge.

The question does not go to actual facts or to the intention of the pleader. It has to do solely with the way facts should be pleaded in order to bring the case made in the indictment within the meaning of the decisions hereinbefore referred to.

But the first overt act charged is not an overt act at all. The conspiracy was not complete until the acts agreed upon were all done: the circular composed and printed and in the hands of the conspirators. Then it might be destroyed. An overt act is an act done in execution or part execution of the conspiracy and the offense is not complete without it. While the printed matter was still in the hands of the conspirators there was always the opportunity for repentance. In United States vs. Britton, 108, U. S. 199, 204, 205, it was said by Mr. Justice Woods:

"The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiae, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute."

See also Hyde vs. Shine, 199 U. S. 62, 76.

So it is with the second overt act charged, that one of the conspirators named, and others unknown, called at the place the circulars were printed for 18,000 of them. It may be that ordering the printing of the circulars and calling for them when printed would be evidence, with other facts, tending to show the conspiracy and bind all other conspirators since they were done during the progress of the conspiracy and in its furtherance. But they were only steps in [fol. 17] the series of steps agreed upon which must be taken before the conspiracy and the acts agreed upon and included in it were complete. It was said by Judge Munger in United States vs. Richards, 149 Fed. 443, 446:

"The overt act must be one independent of the conspiracy or agreement. It must not be one of a series of acts constituting the agree-

ment or conspiring together; but it must be a subsequent, independent act following the complete agreement or conspiracy, and done to carry into effect the object of the original combination."

The first two acts described in the indictment are not overt acts.

Then follow three other alleged overt acts. One charges one of the conspirators named, with publishing, distributing and giving away to Susan Jeffries and to various other persons unknown, by leaving at the residence of Susan Jeffries and various other persons, copies of the circulars set forth in the first overt act charged. One charges another of the conspirators with having published, distributed and given away to one Henry J. Dickhouse and various other persons unknown copies of the same circular; and one charges that another of the conspirators, published, distributed and gave away to one William Steele and other various persons unknown copies of the same circular.

Who were Susan Jeffries and the other persons named? There is no allegation that they were male persons within the draft age. It is probable that Susan Jeffries was not. Were the persons named and persons unknown to whom the publication was made fellow conspirators with the defendants? It may be that the persons unknown were confederates of the defendants who are charged with having confederated together among themselves and with each other and with divers other persons to grand jurors unknown. If they were fellow conspirators then the publication to them would not be an overt act done to effect the object of the conspiracy, for such persons may still have been unwilling to take the final step to effect the object of the conspiracy by publishing the circulars in such a way that they would, or even might, come to the attention of persons within the draft age.

If they were not co-conspirators and not within the draft age, publication to them could not be a publication constituting an overt act, because there is no allegations of the way in which publication to these persons would be a publication to those to whom a publication [fol. 18] was designed to come and influence. What were these persons to do with the circulars? It may be the circulars were delivered to the persons named for the purpose of being destroyed. There must be some sort of connection alleged, or from all the circumstances to be deduced, between these persons and those to be influenced by the publication. There must at least be some showing of the purpose of the publication to the persons named. A crime is made up of acts and intents. United States vs. Cruikshank, 92 U. S. 542, 548. If it had been alleged that the circulars were published broadcast or were being generally distributed and had been delivered to the persons named, for the purpose of scattering them or bringing them to the attention of the persons for whom they were intended and designed, perhaps the allegation of overt acts of that kind would be sufficient. But it does seem that there should be some allegation of how the publication of the circular to these named persons would effect or tend to effect the object of a conspiracy having in mind the printing and publishing of certain circulars, etc., designed to influence a certain class of persons in the community.

This indictment has given the court much concern, for it is realized that in this modern time many technicalities in indictments and generally in the criminal law are not given, and should not be given, the weight given them in years gone by when the judges sought ways by which the rigorous penalties provided by the criminal law in those days of offenses of no great moment might be avoided. But there are still technicalities in the administration of the law which go to the substance and cannot be brushed aside. In view of the decisions of the supreme court, to which reference has been made, it would seem that this indictment, tested by modern rules, does not state the offense sought to be charged as the pleader intended to charge it. If this motion is sustained, the matter may again be brought to the attention of the grand jury and an indictment drawn which would certainly cover the crime sought to be charged.

Under the circumstances, it is now held that the motion to quash, as to the 15th and 16th grounds, is granted. The indictment will be dismissed; but the defendants will be held in custody or on bail to answer to a new indictment in conformity with the practice in the courts of the United States (Judge Leavitt in United States vs. Dus-
[fol. 19] tin, Fed. Cas. No. 15,011).

Hollister, Judge.

Stuart R. Bolin, for the United States.
Edward F. Alexander, Joseph W. Sharts, for defendants.

In the United States District Court

Opinion on Rehearing—Filed October 14, 1918

This court heretofore filed an opinion sustaining defendants' motion to quash the indictment for the reasons given in the opinion. Upon a rehearing on motion of the District Attorney, counsel were heard at length. Their arguments and subsequent briefs have been carefully considered.

Upon reconsideration it is the judgment of the court that the recent decisions of the supreme court dealt with in the opinion were therein, to some extent, and on a vital question, misinterpreted.

While, to complete the offense under Section 37 of the Criminal Code, known as the conspiracy section, it is necessary that an overt act be done by one or more of the parties charged with the conspiracy to effect its object, yet the locus penitentiae referred to in the cases has not to do with the overt act, but with the conspiracy itself. If a conspirator repents and withdraws after the conspiracy and prior to the commission of any act by a conspirator to effect its object, he is guilty of no offense. The moment an act is done to effect the object of the conspiracy, the crime is complete, and repentance comes too late.

To print or cause to be printed a circular of the kind described in the allegations charging the conspiracy, and to deliver such circulars

[fol. 20] to the persons named, may never result in bringing the circular to the attention of anyone sought to be influenced, as alleged; but the intent to do so is alleged, and it is for the jury to say whether the conspiracy was entered into and the overt act or acts done with the intent to bring about the results charged. If so, the crime under Section 37 has been charged.

The motion to quash will be overruled, and a convenient day set for the trial of the cause.

Hollister, District Judge.

For the Government, Stuart R. Bolin, U. S. Attorney.
For the Defendants, James R. Clark, Assistant U. S. Attorney; Nicholas Klein, Ed. F. Alexander, Joseph W. Sharts.

IN UNITED STATES DISTRICT COURT

OPINION ON MOTION TO QUASH INDICTMENT—Filed April 1, 1919

On a re-argument of the motion to quash the indictment, the court finds the motion not well taken, and overrules the same. This is done on the authority of Haas vs. Henkel, 216 U. S. 462, 479, 480; U. S. vs. Barnow, 239 U. S. 74, 79; U. S. vs. Galleanni, 245 Fed. 977, 978. In the case last cited the question was squarely presented and adjudicated by Judge Morton.

Defendants' counsel places much reliance on U. S. vs. Sugar, 243 Fed. 423, 426 (Judge Tuttle); affirmed Sugar vs. U. S., 252 Fed. 79, (C. C. A. 6), wherein, on facts much the same as the facts here, the charge was of a conspiracy to commit an offense against the United States and to defraud the United States, and it was held that the evident purpose being to charge a conspiracy against the law of May 18, 1917, and hence against the United States, the words "to defraud the United States" were mere surplusage.

[fol. 21] Judge Evans, speaking for the Circuit Court of Appeals, said (p. 82):

"A third contention is that the indictment charges two distinct offenses under section 37 of the Penal Code, it being supposed that it was intended to charge that there was also a conspiracy to defraud the United States. Obviously, we think, no such charge is made, inasmuch as there is no specification of any facts to constitute an offense of that character. It was not sufficiently charged, and the court below held that the words 'to defraud the United States' found in the indictment were surplusage, and this, we think, was correct. It becomes clear, therefore, that only one offense is charged, and the contention to the contrary cannot be sustained."

Sugar's case does not justify the reliance placed on it. It did not decide that if the facts had been properly pleaded an indictment on them, alleging the facts and charging them as a conspiracy to de-

fraud the United States, would not lie. On the contrary, it was said that an offense of that character was not sufficiently charged.

It often happens that the same facts are made the basis of distinct counts in an indictment, each count in itself charging the commission of a separate crime. However that may be, the conclusion here is that a conspiracy to defraud the United States in the manner and by the means alleged is sufficiently charged, and an order may be taken overruling the motion.

Hollister, Judge.

Counsel for the Government, Stuart R. Bolin, United States Attorney.

Counsel for the Defendants, Edward F. Alexander, Nicholas Klein.

[fols. 22-24] In United States District Court

Entry Overruling Motion to Quash—Filed April 14, 1919

This cause came on to be heard on rehearing of motion to quash filed herein by defendants and upon argument of counsel, and the Court being fully advised in the premises;

It is hereby ordered that the motion to quash be, and the same hereby is, overruled, to all of which counsel for defendants except.

Hollister, Judge United States District Court, S. D. O.

[fol. 25] In United States District Court

Demurrer—Filed May 7, 1919

Said defendants, by their attorneys, come into Court and say, that the said indictment and the matters and things therein set forth are, as therein alleged and set forth, not sufficient in law to compel these defendants to answer thereto, in the following respects, to wit:

First. Said indictment does not set forth facts sufficient to constitute a conspiracy to defraud the United States of America or any offense against the United States.

Second. Although said indictment charges that defendants conspired to defraud the United States, said indictment nowhere alleges any fraudulent acts on the part of these defendants, or other facts indicating fraudulent acts or fraudulent intentions on the part of these defendants.

Third. Said indictment does not set forth any overt act on the part of defendants, fraudulently done by defendants or done in pursuance of any conspiracy to defraud.

Fourth. Said indictment is vague and indefinite and does not inform defendants of the nature and cause of the accusation so as to enable defendants to plead a former conviction or acquittal; whereby [fol. 26] the constitutional rights of defendants under Article V. and Article VI. of the Amendments to the Constitution of the United States are violated.

Wherefore these defendants pray judgment and that they may be dismissed and discharged of the said indictment.

Ed. F. Alexander, Jos. W. Sharts, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ENTRY OVERRULING DEMURRER—Filed May 7, 1919

This cause came on to be heard on the demurrer to the indictment herein, filed by defendants, leave having first been obtained, and was argued by counsel. The Court, being fully advised, on consideration thereof, finds that said demurrer is not well taken and hereby overrules the same.

To all of which defendants by their counsel except.

Hollister, Judge.

[fols. 27-30] IN UNITED STATES DISTRICT COURT

PLEA OF NOT GUILTY—Entered June 3rd, 1919

This day came the District Attorney on behalf of the United States and the defendants Thomas Hammerschmidt, Lotta Burke, Charles Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander Feldhaus, Joseph Geier, Phil Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn and Alfred Welker, being present in Court and the Indictment herein having heretofore been read to each of them, each and all of them say they are not guilty in manner and form as charged in the said Indictment.

[fol. 31] IN UNITED STATES DISTRICT COURT

VERDICT OF GUILTY—Filed July 24, 1919

We, the Jury, duly empaneled and sworn in the above entitled cause, do find upon the issues joined therein that

Thomas Hammerschmidt is guilty.

Lotta Burke is guilty.

Charles Thiemann is guilty.

Frank Reis is guilty.

Fred Schneider is guilty.

William Gruber is guilty.
Alexander J. Feldhaus is guilty.
Joseph Geier is guilty.
Phil Rothenbusch is guilty.
Arthur Tiedtke is guilty.
Walter Gregory is guilty.
John Hahn is guilty.
Alfred Welker is guilty.
Mercy recommended.

(Signed) Walter L. Remley, Foreman.

[fol. 32] IN UNITED STATES DISTRICT COURT

MOTION FOR A NEW TRIAL—Filed July 26, 1919

Now come the defendants, Thomas Hammerschmidt, Lotta Burke, Chas. Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander Feldhaus, Joseph Geier, Phil. Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn and Alfred Welker, by their counsel, and each moves the Court to set aside the verdict of guilty heretofore herein rendered and to grant said defendants severally new trials for the following reasons:

1. The Court erred in overruling the challenge of defendants to the grand jury panel by which the defendants herein were indicted, to which overruling defendants duly excepted.

2. The Court erred in overruling the motion of defendants to quash the indictment herein to the entry overruling which motion, defendants duly excepted.

3. The Court erred in overruling the plea in abatement filed by defendants herein, to the entry overruling which plea in abatement defendants duly excepted.

4. The Court erred in overruling the demurrer of defendants to the indictment herein, to the entry overruling which demurrer, defendants duly excepted.

5. The Court erred in connection with the selection of the jury for the trial of the defendants by denying these defendants, by their counsel, the right to inquire of prospective jurors as to whether they were members of the American Protective League, an organization claimed by defendants and shown by the trial to have been actively engaged in the arrest of these defendants and claimed by the defendants further, to be hostile to these defendants as Socialists; to which denial defendants duly excepted.

6. The Court erred in refusing to grant defendants' motion to withdraw this cause from the jury upon the statement of the Assistant U. S. Attorney as to the facts the United States expected to show

in support of the cause herein; to which refusal defendants by their counsel duly excepted.

7. The Court erred in the exclusion of evidence offered by defendants, to which exclusion, defendants duly excepted.

8. The Court erred in the admission of evidence over the objection of defendants, to the ruling on which admission, defendants duly excepted.

9. The Court erred in permitting counsel for the United States, without the consent of counsel for defendants and without their [fol. 33] knowledge, to remove temporarily from the records of the Court in the course of the trial, certain exhibits which had been offered in evidence.

10. The verdict herein is contrary to the law of the case.

11. The verdict herein is not supported by sufficient evidence to sustain it and is contrary to the weight of the evidence.

12. The Court erred in overruling the motion made in behalf of each of these defendants, to arrest from the jury and instruct a verdict of not guilty in the case of each of these defendants, at the conclusion of the Government's testimony; to which overruling the defendants severally, by their counsel, excepted.

13. The Court erred in overruling the motion made in behalf of each of these defendants, to arrest from the jury and instruct a verdict of not guilty in the case of each of these defendants, at the conclusion of all the testimony in the cause herein; to which overruling the defendants severally, by their counsel, excepted.

14. The Court erred in refusing to make certain special charges to the jury requested by these defendants, to which refusal defendants duly excepted.

15. The Court erred in refusing to make certain additions to its general charge requested by the defendants, to which refusal defendants duly excepted.

16. Misconduct of the United States Attorney in propounding to defendants, when on the stand, irrelevant questions calculated to prejudice the jury against these defendants.

17. Gross misconduct on the part of the United States Attorney in his argument to the jury, as follows:

(a) In making statements of alleged fact not in evidence, and furthermore untrue, and calculated to prejudice the jury against these defendants.

(b) In making inferences and innuendos as to counsel for defendants and their connection with the cause herein, not sustained by any evidence presented herein and untrue in fact, and calculated to prejudice the jury against the defendants and each of them.

(c) In appealing to the prejudices and passion of the jury.

[fol. 34] 18. Other good and sufficient reasons on the face of the record not herein specified.

Thomas Hammerschmidt, Lotta Burke, Chas. Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander Feldhaus, Joseph Geier, Phil. Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn, Alfred Welker, By Joseph W. Sharts, Ed. F. Alexander, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

MOTION IN ARREST OF JUDGMENT—Filed July 26, 1919

Now come the defendants, Thomas Hammerschmidt, Lotta Burke, Chas. Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander Feldhaus, Joseph Geier, Phil. Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn and Alfred Welker, and severally move the Court upon the verdict of guilty herein rendered that judgment be arrested thereon and the proceedings herein abated for the following reasons:

1. The grand jury which brought the indictment herein was not a legally selected grand jury.

2. The Court erred in overruling the challenge of these defendants to the array of said grand jury at the time of the impaneling of said grand jury; to which overruling, defendants duly excepted.

[fol. 35] 3. There is no sufficient indictment in the cause herein to support any sentence or judgment of the Court founded on said verdict of guilty.

4. The Court erred in overruling the motion of defendants to quash said indictment; to which overruling defendants duly excepted.

5. The Court erred in overruling defendants' pleas in abatement to said indictment; to which overruling defendants duly excepted.

6. The Court erred in overruling defendants' demurrer to said indictment; to which overruling defendants duly excepted.

7. Because in other respects there is no sufficient record to support the charge in this cause.

Wherefore defendants each for himself, severally pray that judgment be arrested and that each of them may be dismissed hence without day.

Thomas Hammerschmidt, Lotta Burke, Chas. Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander Feldhaus, Joseph Geier, Phil. Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn, Alfred Welker, By Joseph W. Sharts, Ed. F. Alexander, Attorneys for Defendants.

[fol. 36] IN UNITED STATES DISTRICT COURT

OPINION ON MOTION IN ARREST OF JUDGMENT AND MOTION FOR NEW TRIAL—Filed February 19, 1920

On motion in arrest of judgment, and on motion for a new trial.

The motion in arrest of judgment is overruled. If there were any irregularities in the drawing of the grand jury, they were not prejudicial to the defendants. No objection was made to the competency of any of the grand jurors, but only to the mode by which they were drawn. United States vs. Reed, Fed. Cas. 16134; United States vs. Eagan, 30 Fed. 608; United States vs. Greene et al., 113 683; Stockslager vs. United States, 116 Fed. 590, 596 (C. C. A. 9); United States vs. Nevin, 199 Fed. 831, 834; Merchants & Miners Transportation Co. vs. United States, 199 Fed. 902 (C. C. A. 5).

The objections to the indictment are overruled on authority of Haas vs. Henkel, 216 U. S. 462; United States vs. Galleanni et al., 245 Fed. 977; Firth vs. United States, 253 Fed. 36 (C. C. A. 4).

On Motion for a New Trial

Pending the hearing of this motion the Honorable Howard C. Hollister, the judge who presided at the trial of the case, died, and this motion is heard by his successor in office. The evidence was taken in stenographic notes by the reporter of this court, and has been fully transcribed. The examination of the jurors on the voir dire was likewise stenographically reported, and the reporter has transcribed so much thereof as bears upon the exception to the refusal of the court to permit defendants' counsel to interrogate jurors as to membership in a certain organization referred to below.

The trial of this cause lasted from July 7, 1919, until July 24, 1919, and the transcript of the testimony is voluminous, comprising 1,485 pages.

The present judge is satisfied that, by the means at hand, he can pass upon the motion and allow a true bill of exceptions, and that it is his duty to do so. R. S. U. S., Section (U. S. Comp. Stat. Ann. [1916], 1590)

The defendants complain that they were denied the right to inquire whether prospective jurors were members of the American Protective League.

It appears from the record that one Nolan, a private citizen and a member of the American Protective League, accompanied the police officers on the night of the arrests and actually arrested one [fol. 37] of the defendants.

The only information concerning the league was the statement of the district attorney upon argument of objection to a question put to one of the veniremen, as to whether he was in any way connected with it. The district attorney stated:

"Now, the ground for my objection before was the same as it is now. There was, as is known to everyone, I suppose, an organ-

ization called the American Protective League, consisting of about five hundred thousand patriotic citizens throughout the United States, some of them known as 'eyes and ears' of the Bureau of Investigation of the Department of Justice, and others as active investigators. The nature of their work was such that their identity must have been undisclosed. The Department of Justice recognized this organization and governed it by keeping all of their officers in line with the regular Bureau of Investigation of the Department of Justice, and were assured by the Department of Justice, in making their investigations, that their identity would be maintained undisclosed by the Department. And through that representation and that promise of a governmental department they were able to do a very efficient work, and that they did perform.

Now, I think that league has been recognized by all of the courts, so far as I have been able to see, and the fact that they were engaged as secret agents of the government has been kept undisclosed by the courts. Any inquiry as to whether or not men were performing a patriotic service, as they were supposed to do, of course, is permissible, but membership in a secret investigating department, which was really a governmental department in secret service work, I believe has been maintained. * * * but it is a matter, I think, of public policy, inasmuch as they were maintained as a secret department under the promise of the government that their identity should not be disclosed; that to protect that membership it is incumbent upon me to make this objection at this time and to ask the court to protect these men who rendered that service, with the understanding that their connection with the service be undisclosed until they disclosed it themselves. That is the ground of my objection, and not as reflecting upon the case. It is the broad public policy as reflecting on the membership; and that is the only basis of my objection."

The stand taken by the district attorney is further shown by the following:

[fol. 38] "Mr. Sharts (of counsel for defendants): * * * I believe the court would agree with me that if one of these jurors were questioned as to his being an agent of the government, in the employ of the government, under the orders of the government, and he admitted that he was, the court would say that he was not competent to sit as a juror in this case.

The District Attorney: We can't agree with that statement."

The position of the district attorney was untenable. (Connors vs. United States, 158 U. S. 408; Crawford vs. United States, 212 U. S. 183, 195; Lavin vs. The People, 69 Ill. 303; Wharton's Criminal practice (10th Ed., Section 1604), and the court did not accept it in its entirety. The ruling was as follows:

"The Court: Well, you may make any inquiry of the individual prospective juror which would tend to develop any activity of

his, but the difficulty with the question is that it would require us to go into the ascertainment of what the American Protective League was, absolutely. * * * The objection will be sustained for the present and you may develop in your inqury to each of the prospective jurors just what his activities were, and we will then see where we come out."

The above-named venireman, Salkeld Larkin, was excused.

Of those finally accepted and who tried this case the question was not asked of five, was asked of, and answer in the negative by five, and was not permitted to be answered by two only, viz., Albert Hamilton and Charles Ford. It therefore becomes pertinent to examine the record of their interrogation on the voir dire.

Mr. Hamilton, in answer to questions put to him by counsel for the defendants, stated as follows:

"Q. Have you been, or are you now, a member of any association that was actively engaged in promoting the war?
A. No, sir.
Q. None of them?
A. None of them.
Q. Were you a member of any association that was formed for the purpose of suppressing radicalism, or had that as one of its purposes?
A. No, sir.
Q. The National Security League, for example?
A. No.
[fol. 39] Q. Have you been, or are you now a member of the American Protective League?

Mr. Clark: I object.
The Court: Sustained.

Q. Enter our exception. Have you been or are you now a member of any association that had for its purpose, or has for its purpose, opposition to socialism?
A. No, sir.
Q. For example, the Knights of Columbus?
A. No, sir."

He also stated, in answer to the district attorney, that he knew of no reason that would prevent his sitting in the case with a fair and open mind, as a fair and impartial juror, considering only the evidence and the law as given from the bench.

Mr. Ford, in response to the questions put by counsel for the defendants, answered as follows:

"Q. Have you been connected financially with the government in any way?
A. Nothing only selling bonds.
Q. You have been selling bonds?
A. That's all.
Q. Been buying them?

A. I mean taking subscriptions for them during the Liberty Loan is all.
Q. Have you purchased bonds yourself?
A. Yes, sir.
Q. War stamps?
A. Yes, sir.
Q. Have you been a member of any association that has been actively engaged in promoting the war?
A. No, sir.
Q. Other than selling bonds?
A. No, sir.
Q. I couldn't understand your answer.
A. Just selling bonds.

The Court: Speak louder.

A. Selling bonds.
Q. That's all?
A. That's all.
Q. Have you been a member of any association formed for the purpose, or that has as one of its purposes, the suppression of radicalism?
A. No, sir.
Q. Have you any connection with the National Security League?
A. No, sir.
[fol. 40] Q. Have you been a member of any association which has as any of its principles opposition to socialism?
A. Not that I know of.
Q. You are not a member of the Knights of Columbus?
A. No, sir.

* * * * * * *

Q. Have you been or are you a member of the American Protective League?

Mr. Clark: I object.
The Court: Sustained.
Mr. Sharts: Enter our exception."

He also declared, in answer to the district attorney, that he was of free and open mind and could sit in the case as a fair and impartial juror.

From the district attorney's description, together with the evidence of the witness Nolan, it appears that the American Protective League was, to some extent, engaged in detecting and apprehending persons suspected of conspiring against the draft law. This would, in a measure, answer the description of "promoting the war."

It would seem, therefore, that membership in the league in question was virtually denied by these answers of the jurors. If the questions asked them were not broad enough to cover the activities of the American Protective League, counsel for the defendants could have made them so. Under the court's ruling they were entitled to make

the question as broad as might be necessary to cover any activity. The veniremen might, for example, have been asked whether they had been engaged in the detecting or apprehending of offenders against the draft laws, or those hostile to the country's interest; and whether they were members of any organization for such purposes. The only limitation was that defendants' counsel could not specifically ask a prospective juror as to membership in this particular organization. But if they could cover this and all like organizations by generic description, the same purpose was fully answered. This seems to be true with regard to the two jurors in question.

The manner of examination of jurors on the voir dire was within the sound discretion of the court. Ruthenberg et al. vs. United States, 245 U. S. 480, 482, and cases there cited. An abuse of such discretion does not appear.

Defendants assign, as ground for a new trial, that Harriet Rothenbusch was not permitted to testify. She was called on behalf of the defendants, sworn, and stated that she was the wife of the defendant [fol. 41] Philip Rothenbusch, whereupon objection was made to her competency, which was sustained. In this there was no error. Logan vs. United States, 144 U. S. at page 301, et seq.; Hendrix vs. United States, 219 United States, 79; United States vs. Jones, 32 Fed. 569 (see not- appended); Talbott vs. United States, 208 Fed. 144 (C. C. A. 5); Johnson vs. United States, 221 Fed. 250 (C. C. A. 8); 1 Greenleaf's Ev., Section 335 and Note 2.

It is also assigned that defendants were not permitted, on cross-examination, to ask the witness Nolan the name of the person who had directed him to become one of the arresting party. The disclosure sought was irrelevant.

The admissibility of various items of evidence is challenged.

The first is the altered entry in the original order book made and identified by the witness Floyd H. Kelly. There was still sufficient of the mutilated entry legible to corroborate, in connection with Kelly's explanation, the proof of the transaction between the defendants who placed the order and the printers; therefore, the court did not err in admitting the same.

The second is the admission of the Socialist Constitution and membership card taken from the person of the defendant Rothenbusch at the time of his arrest. These do not seem to have been improperly admitted, in view of the wide range of examination concerning the principles of the Socialist Party, indulged in by both sides. Certainly, the matter contained therein is not prejudicial, considered with the other evidence in the case. The red color of these papers was a mere circumstance, and can hardly be regarded as serious.

The third is the introduction of the German language newspaper in which were wrapped the "Down With Conscription" circulars identified by the witness Kilgariff. The court cautioned the jury that "the fact that this newspaper is printed in German and was used as a cover for these circulars, if you find that there was such a paper and that there were such circulars that were enclosed in the paper, is not material to any issue in this case which you are now trying." Therefore, the defendants can not be said to have been prejudiced thereby.

The fourth concerns certain of the same circulars offered in evidence which Police Officers O'Neal and Murphy had collected about streets in the vicinity and upon the route taken by certain defendants at about the time they were apprehended. They were identical in character with the circulars taken from the persons of those de-
[fol. 42] fendants after arrest, and with those which the defendants were shown to have distributed nearby. The circumstances were certainly sufficient to warrant a logical inference that the circulars in question had been distributed by the same defendants. Furthermore, this evidence was merely cummulative; inde-d, the distribution of such circulars was not denied.

The defendants contend that the evidence was insufficient to warrant their conviction. It is true that there was a lack of direct evidence as to the terms of the conspiracy; also, that the evidence tended to show that all of th- defendants did not enter into the plot at its inception. But one who joins in a conspiracy after it is formed, knowing of its existence, becomes as much a party thereto from that time as if he had originally conspired. Lincoln vs. Claflin, 7 Wall. 132, 138; United States vs. Cassidy, 67 Fed. 698; United States vs. Standard Oil Co., 152 Fed. 290, 294; Thomas vs. United States, 156 Fed. 897, 912 (C. C. A. 8). And it has been said that a conspiracy to commit a crime may be, and usually must be, from the nature of the case, proved by inference from the acts of the parties and their co-operation. Smith vs. United States, 157 Fed. 721 (C. C. A. 8); Alkon vs. United States, 163 Fed. 810, 812 (C. C. A. 1); Marrash vs. United States, 168 Fed. 225 (C. C. A. 2). It is further settled that the overt act alleged may be considered with the other evidence as one of the circumstances in determining whether or not there was a conspiracy. United States, vs. Richards, 149 Fed. 443, 451; Robin vs. United States, 189 Fed. 568 (C. C. A. 2).

Giving these rules application to the evidence shown by the transcript, it is obvious that there was sufficient upon which to base a conviction. The government's evidence showed that at least some of the defendants confederated among themselves to print a circular in opposition to the selective service law just prior to the date fixed for the registration. The character of circular they agreed to print is best shown by the circular they did print. It was as follows:

"Down with Conscription

The 1st Amendment to the Federal Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[fol. 43] The 13th Amendment to the Constitution of the United States reads:

'Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted,

shall exist within the United States or any places subject to their jurisdiction.'

Conscription is the Worst Form of Involuntary Servitude

The conscription law which the Wilson administration intends to put into effect proposes that the young men of this nation shall be taken from their homes against their will, and sent to the trenches of France to murder and be murdered in a war over the commercial interests of the capitalist class.

Daniel Webster, one of the greatest American statesman, said this of conscription in Congress of this country, December 9, 1814:

'Is this consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No sir, it is not. The constitution is libeled, foully libeled. The people of this country have not established for themselves such a fabric of depotism. They have not purchased at a vast expense of their treasures and their own blood a Magna Charta to be slaves. Where is it written in the constitution, in what article or section is it contained, that you may take children from their parents * * * compel them to fight the battles of any war in which the follies or the wickedness of the government may engage? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest right of personal liberty.'

Every man who is determined to uphold the 'dearest right of personal liberty,' every man who refuses to become a victim of the war declared by the government to protect the millions loaned the Allies by the capitalist- of this country, should

Refuse to Register for Conscription

The Socialist party of Ohio has shown the way in the fight against conscription by adoption of this resolution:

Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing 'involuntary servitude,' in violation of the 13th amendment of the constitution of the United States, in [fol. 44] the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the party, and the workers generally, that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class.

One of the millions of leaflets issued by the Socialist Party.

Socialist Party of Ohio, 1291 Cook Ave., Lakewood, O."

They ordered fifty thousand of these circulars; eighteen thousand were actually printed. The other defendants then entered into the conspiracy to complete the publication of this circular by the distribution thereof. Systematically, with concert of action, and pursu-

ant to a prearranged plan, they did distribute a considerable number of these circulars to the public.

The defense offered was that those of the defendants who ordered the printing did not order the circulars as actually printed, but another circular, lawful in character, omitting the words "Refuse To Register For Conscription," etc., and not coming within the terms of the indictment. Their evidence further tended to show that the printer, of his own volition, departed from the copy from which he was ordered to print, and printed the document above set forth, without authority from any of the defendants; and that defendants, and each of them, although they did receive and distribute the circulars, failed to read the contents until the distribution had taken place.

The issue of fact was very clearly drawn and the case turned almost entirely upon the credibility of the witnesses. That was a matter peculiarly within the province of the jury. By its verdict, it must be presumed to have credited the witnesses of the government and discredited the witnesses of the defense. There is nothing in the evidence that would justify the court in reversing that conclusion.

The defendants complain that the court refused to instruct that conviction could be had only upon proof that the conspiracy was entered into prior to the time the defendants Burke and Hammerschmidt went to the printer's shop to order the printing. The indictment charges a conspiracy to defraud the government of its manpower by obstructing the draft, by printing, publishing and distributing. Under the rules hereinbefore set forth, anyone who entered into [fol. 45] the conspiracy prior to the time the distribution was complete was as guilty as though he had originally conspired. The request referred to disregarded this principle, and was properly refused.

Defendants also complain that the fourth instruction requested by them, that, to convict, the jury must find that the defendants had some dishonest motive or made use of some deception, artifice or dishonest practice in order to deceive or impose upon the government, was not given. This complaint is sufficiently answered by reference to United States vs. Galleanni, supra, and Firth vs. United States, supra.

Several remarks made by the district attorney in the closing argument are also assigned.

A review of the stenographic report of the argument discloses divers objections, but no exceptions taken by the defendants' counsel. The district attorney spoke of one of the counsel for defendants (who had taken the witness stand upon a minor point) as "flying to the support of the defendants, being of allied tendencies and beliefs, of common report in Cincinnati a socialist of long standing," to which the counsel objected. A colloquy then took place, during the course of which the district attorney said that the counsel "had the experience and the education, and from his attitude on the stand," to which only the district attorney said he referred, "had the inclination and was therefore a willing and able instrument in the frame-up presented by the government as its theory in breaking

down this fictitious defense of the defendants," to which counsel for defendants again objected and protested. The court asked the district attorney, at this point, what the counsel had said on the witness stand to which the district attorney was addressing himself. After answer by the district attorney the said counsel for defendants asked leave to reply. The court ruled that he was entitled to be heard, and thereupon said counsel addressed the jury in reply to the district attorney, stating his reason for taking the stand and his version of his testimony, and denying that he was either socialist or known as a socialist.

With the opportunity afforded him, and the statement which he made, counsel for the defendants seems to have been content. He asked for no further action by the court, and took no exception.

The district attorney then continued in the same general strain, and the counsel again objected, urging that the district attorney's statements were incorrect and false. An argument between them [fol. 46] ensued. The court then instructed the jury that while counsel who go upon the witness stand subject themselves to criticism in argument as other witnesses, yet "it would seem that you" (the district attorney) "have gone too far in, in effect, the inference to be drawn. You didn't perhaps intends charging him with coaching witnesses, because that was to directly charge but in a general way say that they were coached by somebody, but the inference was that Mr. Alexander was the one who had done it, and there was no evidence at all that Mr. Alexander had coached any of the witnesses. I will let it go at that."

This ruling seems to have been satisfactory to counsel for the defendants and no exception was taken; and the argument proceeded.

Toward the close of his argument the district attorney was proceeding to state that he had more respect for the leader of the Socialist Party, Eugene Debs, who had been recently tried, although Debs' ideas did not coincide with those of the district attorney or of most people, yet he could respect him for the honesty of his convictions; that he spoke of public knowledge, common report and newspaper publicity. At this point counsel for the defendants interrupted with objection, and the court ruled that the argument was not in order. Although the district attorney proceeded immediately to conclude the same argument, referring to Debs not by name, but by thinly disguised generalization, no further objection was proposed by counsel for the defendants and no exceptions taken.

At the conclusion of the entire argument counsel for the defendants stated: "We want to interpose our objection to the appeal to prejudice and passion in the district attorney's address." No ruling was made upon this objection and no exception taken.

The ordinary rule is that language in argument complained of must be objected to at the time, and if the court refuse to interpose, exception must be taken. Crumpton vs. United States, 138 U. S. 361; Chadwick vs. United States, 141 Fed. 225, 245 (C. C. A. 6); Odell Mfg. Co. vs. Tibbetts, 212 Fed. 652, 654 (C. C. A. 1); Smith vs. United States, 231 Fed. 25, 31 (C. C. A. 9); Sparks vs. United States, 241 Fed. 777 (C. C. A. 6). There may, it seems, be im-

proprieties in argument so flagrant and so prejudicial to the defendant as to require the granting of a new trial, although no exception was reserved at the time (Latham vs. United States, 226 Fed. 420 [fols. 47-50] (C. C. A. 5); but the present case does not appear to be of that sort.

Defendants also complain that they were not separately tried. This was undoubtedly a matter of discretion. Heike vs. United States, 227 U. S. 131. An abuse thereof does not appear.

Defendants further specify that, in the absence of themselves or their counsel, the court permitted the district attorney, during a noonday recess, to withdraw certain exhibits (being one of the "Down with Conscription" circulars above set forth, and also proof of the circular which defendants claim they ordered), for the purpose of making photographic enlargements thereof. This was no part of the trial of defendants, properly speaking; it was a mere matter of custody of evidential documents during an interim in the trial. No prejudice resulted, and consequently the assignment is not well taken. Dowdell vs. United States, 221 U. S. 325; Howard vs. Kentucky, 200 U. S. 164; 16 Corpus Juris, 815; Wharton Crim. Prac. Section 1484.

Defendants also urge that the photographic copies thus made should not have been admitted to evidence. This was a matter of convenience in presentation of the case. Inasmuch as the original documents were in, there is no reason perceived why enlargements, more easily read, should not have been us-d. At any rate, their use was certainly not prejudicial.

The motion for a new trial is overruled.

For the Government, Stuart R. Bolin, United States Attorney; James R. Clark, Assistant United States Attorney.

For the Defendants, Edward F. Alexander, Cincinnati, Ohio; Joseph W. Sharts, Dayton, Ohio.

[fol. 51] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR NEW TRIAL—Filed February 25, 1920

This cause coming on to be heard upon the motion for new trial filed by defendants herein, upon argument of counsel and the court being fully advised in the premises, finds that said motion for a new trial is not well taken: it is therefore hereby

Ordered that said motion for a new trial be, and the same is hereby overruled, to all of which counsel for defendants except.

Peck, Judge United States District Court.

[fol. 52] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION IN ARREST OF JUDGMENT—Filed February 25, 1920

This cause coming on to be heard upon the motion in arrest of judgment filed by defendants herein, upon argument of counsel and the court being fully advised in the premises, finds that said motion in arrest of judgment is not well taken; it is therefore hereby

Ordered that said motion for a new trial be, and the same is hereby overruled, to all of which counsel for defendants except.

—— ——, Judge United States District Court.

IN UNITED STATES DISTRICT COURT

SENTENCE OF DEFENDANTS—Wednesday, February 5th, 1920

This day came the District Attorney on behalf of the United States and the defendants Thomas Hammerschmidt, Lotta Burke, Charles Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander J. Feldhaus, Joseph Geier, Phil. Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn and Alfred Welker, being present in Court, and the Motion for a New Trial and the Motion In Arrest of Judgment and the Motion for a Rehearing of said Motions having been heretofore overruled, thereupon, upon motion of the District Attorney, the Court pronounced the following sentences, to-wit:

That the said defendant Thomas Hammerschmidt be imprisoned in the United States Penitentiary at Atlanta, Georgia, for a period of Fifteen (15) Months;

That the defendant Lotta Burke, be imprisoned in the Missouri State Prison, at Jefferson City, Missouri, for a period of Fifteen (15) Months;

That the defendant Joseph Geier, be imprisoned in the United [fol. 53] States Penitentiary at Atlanta, Georgia, for a period of Fifteen (15) Months;

That the defendant Charles Thiemann, be imprisoned in the United States Penitentiary at Atlanta, Georgia, for a period of One Year and One Day;

That the defendant Frank Reis, be imprisoned in the United States Penitentiary at Atlanta, Georgia, for a period of One Year and One Day;

That the defendant Fred Schneider, be imprisoned in the United States Penitentiary at Atlanta, Georgia, for a period of One Year and One Day;

That the defendant William Gruber, be imprisoned in the United States Penitentiary at Atlanta, Georgia, for a period of One Year and One Day;

That the defendant Alexander J. Feldhaus, be imprisoned in the United States Penitentiary at Atlanta, Georgia, for a period of One Year and One Day;

That the defendant Walter Gregory be imprisoned in the United States Penitentiary at Atlanta, Georgia, for a period of One Year One Day;

That the defendant Phil. Rothenbusch be imprisoned in the Jail of Hamilton County, Ohio, for a period of Six Months and that he pay a fine of One Hundred and Fifty ($150.00) Dollars and the costs of this prosecution to be taxed and that he remain imprisoned in said jail until said fine and costs are paid or until he is otherwise discharged by law;

That the defendant, Arthur Tiedtke, be imprisoned in the jail of Hamilton County, Ohio, for a period of six months and that he pay a fine of One Hundred and Fifty ($150.00) Dollars and the costs of this prosecution to be taxed and that he remain imprisoned in said jail until fine and costs are paid or until he is otherwise discharged by law;

That the defendant John Hahn, be imprisoned in the Jail of Hamilton County, Ohio, for a period of six mnths and that he pay a fine of One Hundred and Fifty ($150.00) Dollars and the costs of this prosecution to be taxed, and that he remain imprisoned in said jail until said fine and costs are paid or until he is otherwise discharged by law;

That the defendant, Alfred Welker, be imprisoned in the jail of Hamilton county, Ohio, for a period of three months and that he pay a fine of one hundred ($100.00) dollars and the costs of this prosecution to be taxed and that he remain imprisoned in said jail until said fine and costs are paid or until he is otherwise discharged by law;

Each of the defendants excepts to the sentence against him and her and the defendants giving notice of their intention to apply for a [fol. 54] writ of error, it is ordered by the court that said sentences be stayed pending the allowance and disposition of a writ of error and that each and all of the said defendants enter into a bond in the sum of $3,500.00 with good and sufficient sureties to be approved by the clerk of this court, conditioned for their appearance before this court from day to day as the court shall direct.

Thereupon, came the said defendant Phil Rothenbusch and executed his bond in the sum of $3,500.00 with T. J. Mulvihill, Emma Helmling and Ernest Zentgraf as sureties and was released from custody.

Thereupon, came the defendant Charles Thiemann and executed his bond in the sum of $3,500.00 with Thomas J. Mulvihill and Katherine Jung as sureties and was released from custody;

Thereupon, came the said defendant Joseph A. Geier and executed his bond in the sum of $3,500.00 with Thomas J. Mulvihill, Fred Romer and Augusta Eiserman as sureties and was released from custody;

Thereupon, came the defendant Lotta Burke and ex-cuted her bond in the sum of $3,500.00 with Dora D. Sebastian, Elizabeth Dacey, and Katherine Laub as sureties, and was released from custody;

Thereupon, came the said defendant Walter Gregory and executed

his bond in the sum of $3,500.00 with Thomah J. Mulvihill, Lawrence Labermeier and William George as sureties and was released from custody;

Thereupon, came the said defendant John Hahn and executed his bond in the sum of $3,500 with T. J. Mulvihill, William Priebs and Lawrence Niewind as sureties and was released from custody;

Thereupon, came the said defendant Fred Schneider and executed his bond in the sum of $3,500.00 with Thomas J. Mulvihill and Nicholas Feckter as sureties and was released from custody;

Thereupon, came the said defendant Alfred Welker and executed his bond in the sum of $3,500.00 with T. J. Mulvihill and Nicholas Feckter as sureties and was released from custody;

Thereupon, came the said defendant Wm. C. Gruber and executed his bond in the sum of $3,500.00 with T. J. Mulvihill, Caroline Ehmann and Max C. Zange as sureties, and was released from custody;

Thereupon, came the said defendant Arthur Tiedtke and executed his bond in the sum of $3,500 with T. J. Mulvihill and Robert Baer [fols. 55-795] as sureties and was released from custody.

Thereupon, came the said defendant Frank Reis and executed his bond in the sum of $3,500 with T. J. Mulvihill and Fred Bruestle as sureties and was released from custody.

[fol. 796] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS

Each of the defendants, Thomas Hammerschmidt, Lotta Burke, Chas. Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander Feldhaus, Joseph Geier, Phil. Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn and Alfred Welker, assigns as errors prejudicial to him, in the record, proceedings, judgment and sentence of the court in the above entitled cause, that the court erred:

* * * * * * *

[fol. 797] 4. In overruling the Demurrer of defendants to the indictment as to the following grounds:

1. Said indictment does not set forth facts sufficient to constitute a conspiracy to defraud the United States of America or any offense against the United States.

2. Although said indictment charges that defendants conspired to defraud the United States said indictment nowhere alleges any fraudulent acts on the part of these defendants, or other facts indicating [fol. 798-840] fraudulent acts or fraudulent intentions on the part of these defendants.

3. Said indictment does not set forth any overt act on the part of defendants, fraudulently done by defendants or done in pursuance of any conspiracy to defraud.

4. Said indictment is vague and indefinite and does not inform defendants of the nature and cause of the accusation so as to enable defendants to plead a former conviction or acquittal; whereby the constitutional rights of defendants under Article V. and Article VI. of the Amendments to the Constitution of the United States are violated.

* * * * * * *

[fol. 841] 59. In overruling the motion of defendants for new trial for the following reasons:

1. The Court erred in overruling the challenge of defendants to the grand pury panel by which the defendants herein were indicted, to which overruling defendants duly excepted.

2. The Court erred in overruling the motion of defendants to quash the indictment herein to the entry overruling which motion, defendants duly excepted.

3. The Court erred in overruling the plea in abatement filed by defendants herein, to the entry overruling which plea in abatement, defendants duly excepted.

4. The Court erred in overruling the demurrer of defendants to the indictment herein, to the entry overruling which demurrer, defendants duly excepted.

5. The Court erred in connection with the selection of the jury for the trial of the defendants by denying these defendants, by their counsel, the right to inquire of prospective jurors as to whether they were members of the American Protective League, an organization claimed by defendants and shown by the trial to have been actively engaged in the arrest of these defendants and claimed by the defendants further, to be hostile to these defendants as Socialists; to which denial defendants duly excepted.

6. The Court erred in refusing to grant defendants' motion to withdraw this cause from the jury upon the statement of the Assistant U. S. Attorney as to the fact the United States expected to show in support of the cause herein; to which refusal defendants by their counsel duly excepted.

7. The Court erred in the exclusion of evidence offered by defendants, to which exclusion, defendants duly excepted.

8. The Court erred in the admission of evidence over the objection of defendants, to the ruling on which admission, defendants duly excepted.

9. The Court erred in permitting counsel for the United States, without the consent of counsel for defendants and without their

knowledge, to remove temporarily from the records of the Court [fol. 842] in the course of the trial certain exhibits which had been offered in evidence.

10. The verdict herein is contrary to the law of the case.

11. The verdict herein is not supported by sufficient evidence to sustain it and is contrary to the weight of the evidence.

12. The Court erred in overruling the motion made in behalf of each of these defendants, to arrest from the jury and instruct a verdict of not guilty in the case of each of these defendants, at the conclusion of the Government's testimony; to which overruling the defendants severally, by their counsel, excepted.

13. The Court erred in overruling the motion made in behalf of each of these defendants to arrest from the jury and instruct a verdict of not guilty in the case of each of these defendants, at the conclusion of all the testimony in the cause herein; to which overruling the defendants severally; by their counsel, excepted.

14. The Court erred in refusing to make certain special charges to the jury requested by these defendants, to which refusal defendants duly excepted.

15. The Court erred in refusing to make certain additions to its general charge requested by the defendants, to which refusal defendants duly excepted.

16. Misconduct of the United States Attorney in propounding to defendants, when on the stand, irrelevant questions calculated to prejudice the jury against these defendants.

17. Gross misconduct on the part of the United States Attorney in his argument to the jury, as follows:

(a) In making statements of alleged fact not in evidence, and furthermore untrue, and calculated to prejudice the jury against these defendants.

(b) In making inferences and innuendos as to counsel for defendants and their connection with the cause herein, not sustained by any evidence presented herein and untrue in fact, and calculated to prejudice the jury against the defendants and each of them.

(c) In appealing to the prejudices and passion of the jury.

18. Other good and sufficient reasons on the face of the record not herein specified.

60. In overruling the motion in arrest of judgment made by defendants on the following grounds:

1. The grand jury which brought the indictment herein was not a legally selected grand jury.

[fol. 843] 2. The Court erred in overruling the challenge of these defendants to the array of said grand jury at the time of the im-

paneling of said grand jury; to which overruling defendants duly excepted.

3. There is no sufficient indictment in the cause herein to support any sentence or judgment of the Court founded on said verdict of guilty.

4. The Court erred in overruling the motion of defendants to quash said indictment; to which overruling defendants duly excepted.

5. The Court erred in overruling defendants' plea in abatement to said indictment; to which overruling defendants duly excepted.

6. The Court erred in overruling defendants' demurrer to said indictment; to which overruling defendants duly excepted.

7. Because in other respects there is no sufficient record to support the charge in this cause.

* * * * * * *

Wherefore each of said defendants prays that the judgment of the District Court against him may be reversed.

Jos. W. Sharts, Ed. F. Alexander, Attorneys for Defendants.

[fol. 844] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed August 23, 1920.

The defendants, Thomas Hammerschmidt, Lotta Burke, Chas. Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander Feldhaus, Joseph Geier, Phil Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn and Alfred Welker, pray for a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to review the judgments entered and sentences pronounced against them in this proceeding upon the 25th day of February, 1920, and have filed herewith their asssignment of errors and pray that the writ of error shall operate as a supersedeas and that they be admitted [fols. 845 & 846] to bail pending the determination of the proceeding on such writ of error.

Joseph W. Sharts, Ed. F. Alexander, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF ERROR—Filed August 23, 1920

On this 23rd day of August, 1920, came the defendants Thomas Hammerschmidt, Lotta Burke, Chas. Thiemann, Frank Reis, Fred

Schneider, William Gruber, Alexander Feldhaus, Joseph Geier, Phil. Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn and Alfred Welker, by their counsel, and filed herein and presented to the court their petition praying for the allowance of a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to operate as a supersedeas, and filed therewith their assignment of errors. On consideration whereof the court allows and signs a writ of error as prayed for to operate as a supersedeas.

J. E. Sater, Judge.

(Judge Peck being absent from District).

[fol. 847] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR—Filed —— —, ——

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Southern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Thomas Hammerschmidt, Lotta Burke, Chas. Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander Feldhaus, Joseph Geir, Phil. Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn and Alfred Welker, defendants, a manifest error hath happened, to the great damage of the said Thomas Hammerschmidt and said other defendants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the * 22nd day of September next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

[fol. 848-856] Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the 23rd day of August, in the year of our Lord one thousand nine hundred and twenty, and of the

---

*Not exceeding 30 days from the day of signing the —.

Independence of the United States of America the one hundred and forty-fifth.

B. E. Dilley, Clerk of the District Court of the United States for the Southern District of Ohio, By T. V. Lamb, Deputy.

Allowed by J. E. Sater, Judge U. S. District Court, S. D. O.

[fol. 857] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED IN PART

Before Knappen, Denison, and Donahue, C. JJ.

Dec. 7, 1922.

This cause is argued in part by Mr. Edward F. Alexander for the plaintiffs in error and is continued until tomorrow for further argument.

IN U. S. CIRCUIT COURT OF APPEALS

CAUSE FURTHER ARGUED AND SUBMITTED

Dec. 8, 1922.

This cause is further argued by Mr. Edward F. Alexander on behalf of the plaintiffs in error and by Mr. James R. Clark, Special Assistant to the Attorney General, on behalf of the defendant in error and is submitted to the court.

IN U. S. CIRCUIT COURT OF APPEALS

JUDGMENT—Filed Feb. 16, 1923

Error to the District Court of the United States for the Southern District of Ohio

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 858] IN U. S. CIRCUIT COURT OF APPEALS

[Title omitted]

Submitted December 8, 1922. Decided February 16, 1923

Error to the District Court of the United States for the Southern District of Ohio, Western Division

Before Knappen, Denison, and Donahue, Circuit Judges

OPINION—Filed Feb. 21, 1923

DONAHUE, Circuit Judge:

The plaintiffs in error were jointly tried and convicted in the United States District Court on an indictment charging an unlawful conspiracy to defraud the United States by impairing, obstructing and defeating the lawful function of the Government of the United States, to-wit: the registration for military service of all male persons between the ages of 21 and 30, both inclusive, as provided by the Act of Congress passed May 18, 1917, by printing or having printed and publishing, displaying or causing to be published, displayed and distributed in various places and to various persons within the district in which said offense was alleged to have been committed, especially to male persons between the ages of 21 and 30, both inclusive, hand bills, circulars, dodgers and other literature composed, printed, intended and designed for the purpose of counselling, advising, aiding and procuring said male persons to evade and refuse to obey the requirements of said Act of Congress.

The indictment also contains a copy of one of eighteen thousand circulars, which copy reads as follows:

(Here follows reproduction of side folio page 859.)

[fol. 860] To this indictment the plaintiffs in error filed a plea in abatement based upon irregularities in the selection of a grand jury.

The evidence offered on the hearing of this plea in abatement tends to prove that at the time the grand jury was drawn the jury box contained more than seven hundred names, in eighteen different packages, each package containing from forty to fifty names of persons eligible as jurors residing in one of the eighteen counties of the district; that the grand jury was drawn without discrimination, from these several packages of names in the jury box by a deputy clerk of the district court and a jury commissioner of opposite politics, in a room of the clerk's office between the outer office and the court room, and the same room in which practically the names of all jurors have usually been drawn.

The fact that the seven hundred or more names in the jury box were in eighteen different packages does not sustain the contention that there were not more than three hundred names in the jury box at the time the grand jury was drawn, but on the contrary the placing

DOWN WITH CONSCRIPTION

The First Amendment to the Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of SPEECH, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The 13th Amendment to the Constitution of the United States reads:

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any places subject to their jurisdiction."

CONSCRIPTION IS THE WORST FORM OF INVOLUNTARY SERVITUDE

The conscription law which the Wilson administration intends to put into effect proposes that the young men of this nation shall be taken from their homes against their will, and sent to the trenches of France to murder and be murdered in the war over the commercial interests of the capitalist class.

Daniel Webster, one of the greatest American statesmen, said this of conscription, in Congress of this country December 9, 1914:

"Is this consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No, sir, it is not. The constitution is libeled, foully libeled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their treasures and their own blood a Magna Charta to be slaves. Where is it written in the constitution, in what article or section is it contained, that you may take children from their parents.....compel them to fight the battles of any war in which the follies or the wickedness of the government may engage? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect to trample down and destroy the dearest right of personal liberty."

Every man who is determined to uphold the "dearest right of personal liberty," every man who refuses to become a victim of the war declared by the government to protect the millions loaned the Allies by the capitalist of this country, should

REFUSE TO REGISTER FOR CONSCRIPTION

The Socialist party of Ohio has shown the way in the fight against conscription by adoption of this resolution:

"Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing 'involuntary servitude,' in violation of the thirteenth amendment of the constitution of the United States, in the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the party, and the workers generally that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class."

One of the millions of leaflets issued by the Socialist Party.
SOCIALIST PARTY OF OHIO—1291 Cook Ave., Lakewood, O.

of a like number of names from each county in the district, in separate packages, is in furtherance of the provision of Section 277 of the Judicial Code that the jury shall be drawn from different parts of the district so as to be most favorable to an impartial trial. U. S. v. M. & M. Transportation Co., 187 Fed., 355; U. S. v. Green, 113 Fed., 683; U. S. v. Rondeau, 16 Fed., 109; U. S. v. Munford, 16 Fed., 164.

The evidence further tends to prove that the room in which this jury was drawn is a part of the public office of the clerk of the United States District Court in the Federal Building in Cincinnati, Ohio, to which room the public have access as a matter of right and not as a mere privilege and that when a jury is being drawn the doors are open and people pass through and at times stop in and watch the drawing. No evidence was offered tending to prove that there was any attempt at secrecy in the drawing of this grand jury or that there was any fraudulent intent and purpose on the part of the officials drawing the same to prevent the public or any individual member of the public from being present when the drawing was made. Stockslager v. U. S., 116 Fed., 590; U. S. v. Rondeau, 16 Fed., 109.

It is further contended that the deputy clerk of court has no authority to act with a jury commissioner of opposite politics in the drawing of a jury. Section 276 of the Judicial Code, as amended [fol. 861] February 3, 1917 (39 Stat. L. 872), specifically provides that this official duty may be performed either by the clerk of the court or a duly qualified deputy.

It is also insisted that the trial court erred in overruling the demurrer to the indictment. The Act of Congress of May 18, 1917, authorized the President of the United States to increase, temporarily, the military establishment of the United Staes. In pursuance of the authority conferred by this statute the Government required the registration for military service of all male citizens between the ages of 21 and 30, both inclusive.

This indictment charges these defendants with a conspiracy to defraud the United States by impairing, obstructing and defeating this lawful function of the Government of the United States and avers in clear and unambiguous language the methods and means employed or to be employed by the defendants and the overt acts that had been committed by the defendants in furtherance of the unlawful purposes of the conspiracy charged. So far as appears by this indictment, the persons charged with this conspiracy did not come within the class of persons that were required to register for military purposes, and as such entitled to challenge the constitutionality of the Government order in a court of competent jurisdiction. On the contrary, it is averred that in furtherance of the unlawful purpose of the conspiracy charged in the indictment, by impairing, obstructing and defeating the lawful function of the Government, these defendants sought to induce other persons required to register, by promises of moral and financial aid, to resist and defy the United States in the exercise of this governmental function.

A conspiracy to defraud the United States within the meaning of Section 37 of the Criminal Code does not necessarily involve a direct

loss to the United States in money or property, but includes a conspiracy to impair, obstruct or defeat the lawful function of any department of the Government. Haas v. Henkel, 216 U. S., 462; U. S. v. Galleanni, 245 Fed., 977; Firth v. U. S., 253 Fed., 36; Curley v. U. S., 130 Fed., 1; Sugar v. U. S., 252 Fed., 79; U. S. v. Sacks, 257 U. S., 37; U. S. v. Janowitz, 257 U. S., 42.

It is claimed on behalf of the plaintiff in error that Haas v. Henkel involved fraud on the part of officials of the Government, and that in the case at bar no such question is presented. However that may be, the sufficiency of each of the four indictments in Haas v. Henkel was challenged for the specific reason that "the indictments do not [fol. 862] allege an illegal conspiracy to commit any offense against the United States." In support of this proposition counsel for Haas asserted (465), "No case has yet applied the statute unless the acts complained of constituted the deprivation of a right or duty imposed on a department of the Government by statute or that the acts operated to deprive the Government of property or the right of property." In deciding this proposition and as a direct answer to the argument in the brief of counsel for Haas, the Supreme Court said: "But it is not essential that such a conspiracy shall contemplate a financial loss, or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful functions of any department of the Government." This same question is necessarily decided in U. S. v. Sacks and in U. S. v. Janowitz, et al., supra. Nor in our opinion is this broad statement of the law above quoted from the opinion in Haas v. Henken mere dictum in respect to the implied holding that artifice and deceit are not necessarily involved in a conspiracy of this character. The gist of the conspiracy charged in Haas v. Henkel was not the deception of anyone, but on the contrary that an associate statistician of the Bureau of Statistics would furnish to his co-conspirators the information to be contained in the cotton crop reports in advance of their official issue.

In the case of Hormon v. U. S., 116 Fed., 350, this court held that "A scheme or artifice to defraud is not limited in its meaning to such as are to be accomplished by means of deception or trickery."

In Edwards v. U. S., 249 Fed., 686, this court in discussing the opinion in Hormon v. U. S., supra, said: "In that case the court was holding that the words 'to defraud' may reach an injury by force or intimidation as well as an injury by trickery; but we think there was no purpose to hold that there must necessarily be an intent to get another's money without giving value for it."

Nor is this indictment vague, uncertain or indefinite in any particular. It clearly and distinctly states the unlawful purpose and object of the conspiracy and the means by which the alleged conspirators, named in the indictment, sought to accomplish its purpose. So far as these defendants are concerned, there is no possibility of their being twice put in jeopardy for the same offense, regardless of whether others not included in this indictment may or may not be subject to prosecution for participation in the same conspiracy.

[fol. 863] The indictment contains a copy of one of the eighteen

thousand circulars actually printed or caused to be printed and distributed or caused to be distributed. For the purposes of this demurrer this copy must be accepted as a true copy of the circular ordered or caused to be printed by two of the defendants, as charged in the indictment, for the purpose of distributing and publishing or causing the same to be distributed and published, and that were later acually distributed.

This circular in and of itself evidences not only the intent and purpose of the person or persons responsible for its publication and distribution, but also its potential tendency to accomplish the purpose of the conspiracy charged. It not only attacks the law as the worst form of involuntary servitude and advises those coming within its terms to refuse to register for military service, but in addition thereto pledges financial and moral support to all members of the Socialist Party of Ohio and to workers generally who refuse to register as required by this Act of Congress and the lawful proclamations and regulations promulgated under its provisions. The demurrer was properly overruled.

The right of persons jointly indicted for conspiracy to a separate trial rests in the sound discretion of the trial court. Heike v. U. S., 227 U. S., 131, and cases there cited. There is nothing in this record tending to prove that the trial court abused its discretion in refusing these defendants separate trials. The claim that the defendants other than Lotta Burke were prejudiced by the refusal to grant them separate trials because the testimony of Lotta Burke is in direct conflict with the testimony of Thos. Foster, who printed the circular, is untenable. Whether Lotta Burke was or was not responsible for having these circulars printed in form and substance as claimed by the Government and exhibited in the indictment, when these circulars came into the hands of the other defendants for distribution, they were a finished product and the guilt or innocence of these defendants who distributed them, must be determined by what the circulars then contained and their knowledge or lack of knowledge of their contents.

It is also claimed on behalf of the plaintiffs in error that the verdict of guilty is not sustained by sufficient evidence, and in that connection counsel call attention to the fact that, at the time of this trial, public opinion was so inflamed that it was not necessary for the Government to prove the defendants guilty, but rather defend-
[fol. 864] ants were compelled to prove their innocence; that the guilt or innocence of the defendants was subordinated to the need of victims with which to fan the flame of war patriotism and to terrorize the supposedly large German population of Cincinnati. This argument, however, overlooks the fact that this cause was not tried until July, 1919, practically eight months after the signing of the armistice and long after the conviction of these defendants was necessary, for the purposes of the war, to "fan the flame of war patriotism" or to "terrorize" anyone. However high the war feeling may have been at the time this offense was committed, at the time of the trial that feeling had subsided; at least to such an extent that it was negligible, but even if the case had been tried immediately after the commission of the offense, this court would have no power to determine the weight of the evidence.

Evidence was offered by the government tending to prove every material allegation of this indictment against each and all of these defendants. It is true that there is a substantial conflict in the evidence, but in determining whether the verdict is supported by any substantial evidence the conflict in the evidence is unimportant. A motion to direct a verdict for the defendant concedes, for the purposes of the motion, the truth of the testimony offered on the part of the Government and all necessary and natural inferences arising therefrom. The attack made by counsel for plaintiffs in error upon the testimony of the witness Foster is a practical admission that this court could not find this verdict of guilty not sustained by sufficient evidence, without wholly disregarding his testimony. This applies equally to the other witnesses offered on the part of the Government whose testimony relates to material allegations of the indictment.

It is claimed however, that, accepting the testimony offered by the Government as true, it fails to establish a conspiracy between these defendants to accomplish the unlawful purpose charged in the indictment. The Government is not required to furnish direct proof as to the making and entering into the unlawful agreement. It is sufficient to sustain a verdict of guilty of conspiracy if the evidence shows a concert of action in the accomplishment of the unlawful purpose or proof of other facts and circumstances from which the natural inferences arise that the unlawful overt act or acts were in furtherance of a common design within the intent and purpose of the alleged conspirators. Davidson et al. v. U. S., 274 Fed., 285, [fol. 865] and cases there cited. Nor is it necessary to establish by the evidence that all the conspirators, at the inception of the conspiracy, met and entered into the unlawful agreement. Conspiracy is a continuous crime. Brown v. Elliott, 225 U. S., 392. If one join a conspiracy after it has been formed and with knowledge of the facts, contributes to the accomplishment of its purpose he is equally guilty with the original conspirators, although some of the conspirators may be wholly unknown to him. Rudner v. U. S., 281 Fed., 516.

It is also claimed that the district attorney was guilty of gross misconduct in accusing defendants counsel of subornation of perjury in the absence of any evidence tending to establish such charge. One of counsel for defendants, Mr. Alexander, was called as a witness and the district attorney commented severely upon his testimony and his attitude upon the stand. Objections were interposed and the witness permitted to answer in person, the statement made by the district attorney. Later a further objection was interposed to the argument of the district attorney. The objection was sustained, the court saying to counsel in the presence of the jury "You have gone too far * * * there was no evidence at all that Mr. Alexander had coached any of the witnesses. I will let it go at that." No exceptions were taken to the statement of the court and no request was made by the defendants for further action or instructions by the court. Nor was any motion made to withdraw a juror upon the theory that the argument of the district attorney was of such a character as to work a prejudice to the defendants regardless of the efforts of the court to remove its effect from the minds of the jury.

The court not only sustained these objections and admonished counsel, but it also went to the extent of permitting counsel for defendants who had testified in the case, to interrupt the argument of the district attorney at the time the objections were made and explain his own testimony to the jury. So far as this record discloses counsel for defendants were then entirely satisfied with the action of the court and permitted the cause to be submitted to the jury without further protest. It would seem unnecessary to say that they can not now be heard to complain.

A number of other errors are assigned in reference to the admission and rejection of evidence but it is impracticable and unnecessary to review these in detail. It is sufficient to say that in the opinion [fol. 866] of this court no error intervened in the trial of this cause to the prejudice of the defendants in error.

The judgment of the district court is affirmed.

DENISON, Circuit Judge:

I think the demurrer to the indictment should have been sustained; and in order that, if review is sought in the Supreme Court the attention of that court may be directed more expressly to what I think the right view of the statute, I depart from our usual custom of letting dissent go unnoted.

The Selective Service Act, so called (Act of May 18, 1897; 40 Stats., 76), and the proclamations pursuant to it required registration on June 6, 1917, of all young men between 21 and 31. The law evidently contemplated a compulsory military service outside the United States. These respondents thought that such requirement was unconstitutional, and that their constitutional right of free speech pemitted them to say so. Their ideas were unsound, but it had not then been expressly so decided; and their claims were, in the abstract, at least as plausible as those commonly made, that courts may not adjudge any law invalid as unconstitutional, and that an injunction obstructing what defendants think are their constitutional rights need not be obeyed, and such claims are not punished; but the existing state of war made these respondents' concrete conduct disloyal and intolerable. There was no law directly forbidding it (this was before the Espionage Act of June 15, 1917), and so they were indicted under Sec. 37 of the Penal Code.

This covers two offenses; conspiracy to commit an offense against the United States and conspiracy to defraud the United States. They are obviously separate offenses. Refusal to register was an offense under the Selective Service Act; but these respondents were not subject to registration, and were not planning to refuse, but only to get others to do so. Perhaps for this reason it was thought that a charge of conspiracy to commit an offense would not lie; but, whatever the reason, the indictment was solely for conspiracy to defraud the United States. Thus the question is "Does one who stands upon his supposed right to refuse to obey an unconstitutional law thereby 'defraud' the United States, if it turns out that the law was valid?"

Fraud in its ordinary and primary sense, involves the thought of

artifice, overreaching or deceit. To defraud another seems at first thought to be to induce his action or conclusion by some kind of [fol. 867] direct or indirect misrepresentation. This is Bouvier's definition of fraud. This court led the way in an extension of this strict meaning to a case where the property of another was obtained through a scheme of threats and intimidation. (The blackmail and "black hand" cases under Sec. 215, See Horman v. U. S., 116 U. S. 350.) We held that a scheme to defraud another of his property wrongfully, though without using deception or trickery, is a "scheme to defraud." This conclusion was reached largely through a liberality of construction based on the general purpose of that statute (Sec. 215) to protect the mails. On page 354 the "lexical meaning" was discussed, to show that no violence was being done to that meaning. The quoted definitions all indicate not only that one must be deprived of his property or property rights, but that it must be done dishonestly or by taking advantage. Does the burglar "defraud" his victim of the stolen property, or the recalcitrant employee "defraud" the employer of the promised service? The Horman case does not so teach. Imprisonment is still permitted in civil actions for frauds in many states, but it could hardly be imposed upon the servant who merely ran away.

Another line of cases dissipates the "equally as good" defense, and holds that one who is misled by deception may predicate thereon a charge of fraud, even though he received actual value as great as he parted with or as he was promised, if he did not get what was deceptively held out. The reason is, as we said in Edwards v. U. S., 249 ed. 686,689, that fraud lies in "an intent to mislead the owner in any particular that affects his complete intelligent consent."

In Curley v. U. S.—C. C. A. 1—130 Fed. 1, the conspiracy involved both wrongfully getting a salarly out of the United States, and doing so by trickery and deceit. It was not found that the indictment would be good except for its disclosure of one or the other of these elements; indeed Judge Bingham's opinion indicates the necessity of demonstrating one or the other,—or both.

I find no authoritative or persuasive opinion (unless the one to be later considered) which permits the conclusion that there was a defrauding in the absence of (1) any deception or misleading or (2) any deprivation of a property right. Usually both are found, but it would seem that one there must be, else the accepted definition fails; but however compelling these views might be, they must be yielded, if the contrary has been decided by the Supreme Court. This brings us to Haas v. Henkel, 216 U. S. 462, 479. The quoted phrase "im-[fol. 868] pairing, obstructing or defeating the lawful function of any department of Government" is all inclusive. The departments of Government comprise the whole, and there is thus no crime or offense which does not impair or obstruct the lawful function of some department. The phrase reaches not only what respondents did here, but would have reached as well agitation and persuasion against voluntary enlistment in this war, or against the prosecution of the Mexican or the Spanish War. I can not think it was intended to have any such far reaching effect, nor to go beyond what was

reasonably pertinent to the issue in the Haas case. In that case what Holmes and Haas had done was claimed not to have involved the United States in any financial or property loss, and not to have been a statutory offense, and hence it was argued by counsel (p. 466) that there was no defrauding. The court overruled both of these contentions, and there was no other (here relevant) controversy in the case. It was not claimed in argument, or suggested in opinion (unless in the quoted phrase) that a conspiracy to defraud which lacked the element of financial loss, did not still necessarily imply some chicanery. The conduct of Holmes and Haas was thoroughly "crooked," and this connotes fraud in the ordinary sense of that word. Holmes was corruptly to betray the confidence of his superiors and he was to continue to get official information under the implied promise that he would keep it secret, while he was constantly intending not to do so. The moment the conspirators failed longer to deceive and mislead the department as to what was going on, the conspiracy failed. Artifice, concealment of the truth, corruption, were the foundations of the conspiracy. It seems to me that a definition of "to defraud," given in such case, and which definition (unnecessarily as to that case) omits a commonly accepted element of the offense, should not be taken as a deliberate and authoritative exclusion of that element.[1]

As confirmatory, it will be noted that all the cases cited on p. 480 are only to the point that property loss is not essential.

Haas v. Henkel was cited, generally, in U. S. v. Foster, 233 U. S. 515, 526; but the case was one of deception practiced by the post-[fol. 869] master in reporting as stamp sales of his office money which did not honestly belong there, and he thereby fraud-ently increased his salary. In U. S. v. Barnow, 239 U. S. 74, 79, the entire phrase in question is quoted from Haas v. Henkel, but it is cited only to the point that financial loss is not essential. The offense was a false pretense of official authority. The defense was that the office was nonexistent, and hence there would be no fraudulent assumption thereof. The case does not hold that there can be fraud without deception. In Sacks and Janowitz v. U. S., 257 U. S. 37, 42, stamps had been torn from one certificate and put on another. The defense was that it was lawful to do so. When it was once decided that the regulation forbidding transfer was a valid basis for the prosecution, it was apparent that to alter an obligation and procure unlawful payment thereof was to defraud the United States, under every definition of fraud.

These are the reasons indicating to me that to disobey the draft law should not be deemed "to defraud the United States."

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[1] Haas v. Henkel was expressly applied to a case like this by the District Court of Massachusetts (U. S. v. Galleanni, 245 Fed. 977), and impliedly by the Fourth C. C. A. in Firth v. U. S., 253 Fed., 36. In Sugar v. U. S., 252 Fed. 79, 82, this court seems to have thought that an indictment like this did not charge a conspiracy to defraud, but the point was not controlling, and Haas v. Henkel was not cited.

IN U. S. CIRCUIT COURT OF APPEALS

MOTION TO STAY MANDATE—Filed Feb. 26, 1923

Now come the plaintiffs in error above named with the exception of Walter Gregory, who has died since the commencement of the proceedings herein, and move that the court stay its mandate in this cause pending application to the Supreme Court of the United for a writ of certiorari.

Ed. F. Alexander, Attorney for Plaintiffs in Error.

To Thomas H. Morrow,
United States District Attorney:

Please take notice that the above motion will be submitted in the above entitled court on the 6th day of March, 1923, at 9:30 A. M.

Ed. F. Alexander, Attorney for Plaintiffs in Error.

Received copy of above motion and notice.

Thos. H. Morrow, United States District Attorney.

[fol. 870] IN U. S. CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed March 7, 1923

Ordered, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari, is hereby granted subject to the following condition: that plaintiffs in error shall within 30 days from the date of this order file their petition for the writ in the Supreme Court and, upon giving notice to opposing counsel of date for submission as required by Supreme Court Rule 37, present the petition in open court on the first motion day thereafter; unless this condition is complied with, or its non-observance sanctioned by the Supreme Court, the mandate herein will issue, but in the event of compliance with the condition imposed or of such sanctioned non-observance the mandate will be stayed until final action in the case is taken by the Supreme Court.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CERTIFICATE OF CLERK

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Thomas Hammerschmidt, et al. vs. The United States of America. No. 3585, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 8th day of March, A. D. 1923.

Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. [Seal of United States Circuit Court of Appeals, Sixth Circuit.]

[fol. 871] WRIT OF CERTIORARI AND RETURN—Filed June 6, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Thomas Hammerschmidt et al. are plaintiffs in error, and The United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send [fol. 872] without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-fifth day of May, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, Arthur B. Mussman, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 2nd day of June, A. D., 1923, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

THOMAS HAMMERSCHMIDT et al., Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendants in Error.

Stipulation as to Record

It is hereby stipulated between the parties hereto that the record already on file in the Supreme Court shall stand as a return to the writ of certiorari issued herein.

Joseph W. Sharts, Ed. F. Alexander, Counsel for Plaintiffs in Error. James M. Beck, Solicitor General.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official seal, signature and the seal of said Circuit Court of Appeals at the City of Cincinnati, Ohio, in said circuit this 2nd day of June, A. D. 1923.

Arthur B. Mussman, Clerk United States Circuit Court of Appeals for the Sixth Circuit. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

[fols. 873 & 874] [File endorsement omitted.]

[fol. 875] [File endorsement omitted.]

[fol. 876] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND PARTS OF RECORD TO BE PRINTED—Filed June 18, 1923

To the Clerk:

Plaintiffs in error, upon the hearing before this court, will rely entirely on the following ground of error:

1. That the demurrer to the indictment herein should have been sustained.

Plaintiffs in error request that the following portions of the record as heretofore certified to the court may be printed as constituting all of the record necessary to a consideration of the points above set forth:

Vol. I (references are to page numbers of the printed record).

1. Indictment—pages 4 to 9;

2. Motion to quash—pages 9 to 12;

3. Opinion on motion to quash the indictment—pages 12 to 19;

4. Opinion on rehearing—pages 19, 20;

5. (Third) Opinion on motion to quash the indictment—pages 20, 21;

6. Entry overruling motion to quash—page 22;

7. Demurrer—pages 25, 26;

8. Entry overruling demurrer—page 26;

9. Plea of not guilty—page 27 to end of first paragraph "said indictment."

10. Verdict of guilty—page 31;

11. Motion for new trial—pages 32 to 34;

12. Motion in arrest of judgment—pages 34, 35;

13. Opinion on motion in arrest of judgment and motion for new trial—pages 36 to 47;

14. Order overruling motion for new trial—page 51;

[fol. 877] 15. Order overruling motion in arrest of judgment—page 52;

16. Sentence of defendants—pages 52 to 55;

Vol. II

17. Assignment of Errors.

a) introductory paragraph (through "the court erred") page 796;

b) Assignment 4, page 797, "In overruling the Demurrer" through subhead 4, "United States are violated," page 798;

c) Assignment 59, entire, pages 841-842;

d) Assignment 60, entire, pages 842-843;

e) Prayer for reversal, "Wherefore each of" through "Attorneys for Defendants," page 844;

18. Petition for writ of error—pages 844, 845;

19. Order allowing writ of error—page 845;

20. Writ of error—page 847;

21. Proceedings and opinions in the United States Circuit Court of Appeals for the Sixth Circuit—pages 857-870;

also:

22. Petition to Supreme Court for Writ of Certiorari, pages 1-7;

23. Order granting writ of certiorari;

24. Writ of Certiorari;

25. Stipulation as to certified record.

Joseph W. Sharts, Ed. F. Alexander, Counsel for Plaintiffs in Error.

To the Clerk:

Receipt of copy of the foregoing precipe is acknowledged on behalf of defendant in error.

James M. Beck, Solicitor General, By Wm. J. Hughes.

[fol. 878] [File endorsement omitted.]

Supreme Court of the United States

No. [illegible], OCTOBER TERM, 19[illegible].

THOMAS HAMMERSCHMIDT et al,
Petitioners,

vs

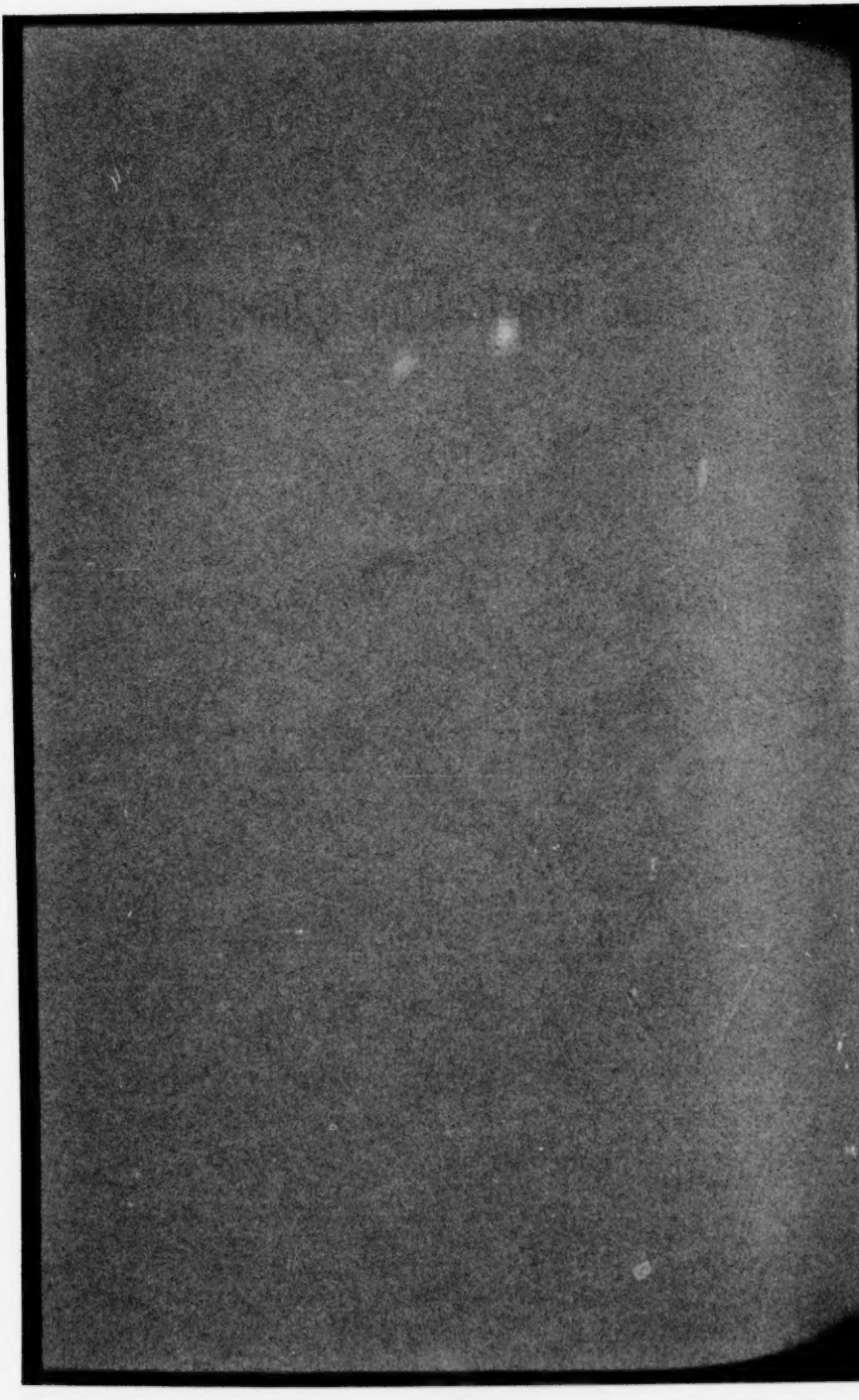
THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONERS.

ED. F. ALEXANDER,
JOSEPH W. SHARTS,
Counsel for Petitioners.

COURT INDEX PRESS, [illegible] MAIN, CINCINNATI [illegible] December, 19[illegible].



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AUTHORITIES CITED.

Supreme Court of the United States

THOMAS HAMMERSCHMIDT ET AL,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Brief for Petitioners

I.

PRELIMINARY STATEMENT.

This cause comes into this court by *writ of certiorari* to the Circuit Court of Appeals for the Sixth Circuit. The said court, by divided vote, affirmed the conviction of plaintiffs in error in the District Court for the Southern District of Ohio, Western Division, on a charge of conspiracy to defraud the United States (U. S. Penal Code, Sec. 37). The trial in the District Court took nearly three weeks and a large number of errors were assigned in the Circuit Court of Appeals. The petition for the writ in this court was based on the sole ground that the demurrer to the indictment should have been sustained. This was likewise the ground on which the dissenting judge in the Circuit Court based his dissent, and will be the only ground urged in this brief.

The indictment follows:

(N. B. It will be noted that the alleged acts of the indictment took place May 27th to June 1, 1917, being before the enactment of the Espionage Law and other war laws.)

II.

INDICTMENT. (Rec., pp. 1-3.)

"First Count, Section 37, Penal Code.

"The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Western Division of the Southern District of Ohio, at the October Term thereof, in the year nineteen hundred and seventeen, and inquiring for that division and district, upon their oaths annd affirmations present:

"That on or about, to-wit, the twenty-seventh day of May, in the year nineteen hundred and seventeen, in the City of Cincinnati, in the State of Ohio, and in the Western Division of the Southern Judicial District of Ohio and within the jurisdiction of this Court, Thomas Hammerschmidt, Lotta Burke, Charles Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander J. Feldhaus, Joseph Geier, Philip Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn and Alfred Welker, in this indictment hereafter called defendants, did then and there knowingly, wilfully and unlawfully conspire, combine, confederate and agree together among themselves and with each other and with divers other persons to said Grand Jurors unknown, to defraud the United States by impairing, obstructing and defeating a lawful function of the Government of the United States, to-wit, the registration for military service of all male persons between the ages of twenty-one and thirty, both inclusive, as provided by the Act of Congress passed May 18, 1917, entitled 'An Act to authorize the President to Increase Temporarily the Military Establishment of the United States' and the lawful proclamations and regu-

lations promulgated under the provisions of said Act, by printing, or having printed, and publishing, displaying and distributing or having published, displayed and distributed in various places and to various persons in said district, especially to male persons between the ages of twenty-one and thirty, both inclusive, hand bills, circulars, dodgers, and other literature, composed, printed, intended and designed for the purpose of counseling, advising, aiding and procuring said persons, especially said male persons between the ages of twenty-one and thirty, both inclusive, to evade and refuse to obey the requirements of said Act of Congress, by which said Act and the proclamations and regulations promulgated thereunder, said persons were required to present themselves for and submit to registration under the provisions of said Act and the proclamations and regulations promulgated thereunder.

"And the Grand Jurors further present that to effect the object of said conspiracy and in furtherance thereof the said Thomas Hammerschmidt and Lotta Burke did, on or about the twenty-seventh day of May, in the year nineteen hundred and seventeen, for themselves and the other defendants herein, order from the Queen Card Company, a partnership composed by Thomas A. Foster and Floyd H. Kelley, which said partnership was then and there engaged in the printing business in said City of Cincinnati, Hamilton County, Ohio, aforesaid, the printing of a certain lot of fifty thousand hand bills, circulars or dodgers, which said hand bills, circulars or dodgers were each in the letters, figures, form and style as the following, which is an exact copy and is inserted herein and made a part of this indictment:

DOWN WITH CONSCRIPTION

The First Amendment to the Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of SPEECH, or of the press or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The 13th Amendment to the Constitution of the United States reads:

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any places subject to their jurisdiction."

CONSCRIPTION IS THE WORST FORM OF INVOLUNTARY SERVITUDE

The conscription law which the Wilson administration intends to put into effect proposes that the young men of this nation shall be taken from their homes against their will, and sent to the trenches of France to murder and be murdered in the war over the commercial interests of the capitalist class.

Daniel Webster, one of the greatest American statesmen, said this of conscription, in Congress of this country December 9, 1814:

"Is this consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No, sir, it is not. The constitution is libeled, foully libeled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their treasures and their own blood a Magna Charta to be slaves. Where is it written in the constitution, in what article or section is it contained, that you may take children from their parents.....compel them to fight the battles of any war in which the follies or the wickedness of the government may engage? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect to trample down and destroy the dearest right of personal liberty."

Every man who is determined to uphold the "dearest right of personal liberty," every man who refuses to become a victim of the war declared by the government to protect the millions loaned the Allies by the capitalist of this country, should

REFUSE TO REGISTER FOR CONSCRIPTION

The Socialist party of Ohio has shown the way in the fight against conscription by adoption of this resoluton:

"Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing 'involuntary servitude,' in violation of the thirteenth amendment of the constitution of the United States, in the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the party, and the workers generally that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class."

One of the millions of leaflets issued by the Socialist Party.
SOCIALIST PARTY OF OHIO—1291 Cook Ave., Lakewood, O.

"And the Grand Jurors also present that to further effect the object of said conspiracy the said Lotta Burke, and other persons the exact names and number of whom is unknown to this Grand Jury, on or about, to-wit, the thirty-first day of May, in the year nineteen hundred and seventeen, called for and received about eighteen thousand of the above described lot of handbills, circulars and dodgers from the said The Queen Card Company, with the intent and for the purpose of distributing and publishing said handbills, circulars and dodgers, and causing the same to be distributed and published as aforesaid.

"And the Grand Jurors also present that to further effect the object of said conspiracy the said Charles Thiemann, on or about, to-wit, the first day of June, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton, and State of Ohio, and within the jurisdiction of this Court, did publish, distribute and give away to one Susan Jeffries, and to various other persons unknown to this Grand Jury, by leaving at the residence of said Susan Jeffries and said various other persons, copies of the aforesaid handbill or circular beginning 'Down With Conscription,' a copy of which is hereinbefore inserted and made a part of this indictment and to which inserted copy, for brevity and further particularity, reference is hereby made.

"And the Grand Jurors also present that to further effect the object of said conspiracy the said Frank Reis, on or about, to-wit, the first day of June, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton, and State of Ohio, and within the jurisdiction of this Court, did publish, distribute and give away to one Henry J. Dickhouse, and to various other persons unknown to this Grand

Jury, copies of the aforesaid handbill or circular beginning with 'Down With Conscription' a copy of which is hereinbefore inserted and made a part of this indictment and to which inserted copy, for brevity and further particularity, reference is hereby made.

"And the Grand Jurors also present that to further effect the object of said conspiracy the said Walter Gregory, on or about, to-wit, the first day of June, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton, and State of Ohio, and within the jurisdiction of this Court, did publish, distribute and give away to one William Steele, and to various other persons to these Grand Jurors unknown, copies of the aforesaid handbill or circular beginning 'Down With Conscription,' a copy of which is hereinbefore inserted and made a part of this indictment and to which inserted copy, for brevity and further particularity, reference is hereby made.

"Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

III.

Analysis of Indictment.

The indictment may be analyzed as follows, using the terminology employed by the pleader:

1. Offense Charged.

(a) Defendants conspired to defraud the United States.

(b) by impairing, obstructing and defeating a lawful function of the Government of the United States,

(c) to-wit, the registration for military service, etc.

2. Description of Conspiracy.

(a) By printing, publishing, displaying and distributing,

(b) to various persons, especially males between the ages of twenty-one and thirty,

(c) handbills, circulars, dodgers and other literature,

(d) *composed, printed, intended and designed for the purpose of* counseling * * *, to evade and refuse to obey the requirements of the Conscription Act.

(N. B. The indictment does not allege that any specific circular was agreed on either in *haec verba* or in substance.)

3. Overt Acts.

(a) The ordering of the printing of a specific circular by two of the defendants,

(b) obtaining from the printer eighteen thousand copies of said specific circular, by one of the defendants,

(c), (d), (e) delivering copies of said specific circular to Susan Jeffries, Henry J. Dickhouse and William J. Steele.

(N. B. There is no allegation that any of these three persons was subject to the registration act.)

IV.

Questions Arising on the Indictment.

In the light of the foregoing analysis, three questions of law present themselves:

1st. Do the alleged acts constitute a conspiracy to defraud the United States?

2nd. Does the conspiracy charge set forth anything more than the conclusion of the pleader as to intended conspiratous handbills not set out either in *haec verba* or in substance?

3rd. Does the application of the conspiracy statute to the alleged facts of the indictment contravene the First Amendment to the United States Constitution?

V.

Conspiracy to Defraud.

The only offense charged here is "conspiracy to defraud the United States.' This offense is alleged to have consisted in an attempt to print and distribute *handbills and other literature 'designed for the purpose of coun-counseling, etc.'* refusal to obey the conscription act. The government to make its use of the word "defraud" clear charged the offense not simply as a "conspiracy to defraud the United States" but as a "conspiracy to defraud the United States by impairing, obstructing and defeating a lawful function of the government of the United States," these words being taken almost verbatim from *Haas* v. *Henkel*, 216 U. S., 462, 479, as follows:

> "But it is not essential that such a conspiracy shall contemplate a financial loss, or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful functions of any department of the Government."

The validity of the indictment is made to rest on the foregoing language of the Supreme Court. Similar counts have been sustained on the strength of the same citation, in *U. S.* v. *Galleanni*, 245 Fed., 977, and in *Firth* v. *U. S.*, 253 Fed., 36 (C. C. A., 4),

(V a) HAAS v. HENKEL, 216 U. S., 462, 479.

An examination of *Haas* v. *Henkel* shows that there is at least no similarity of the facts of that case to those of the instant case. In that case, Haas conspired with an employee of the Department of Agriculture to obtain from him information as to crop prospects in advance of the regular publication, and to have the published reports falsified. On the strength of these arrangements Haas expected to speculate on the cotton market. The defendants claimed that the government had suffered no loss and could therefore not have been defrauded. The court, however, held that frauds on the government were not necessarily financial, using the language set forth under V.

(V b) THE GOVERNMENT'S APPLICATION OF HAAS v. HENKEL.

The government, in effect, claims that the language of *Haas* v. *Henkel,* as set forth above, extended the meaning of the word "defraud" as applied to government to cover any form of opposition to any "function of the United States" as here opposition to the registration under the conscription act on the claimed ground of unconstitutionality.

(V c) COROLLARIES OF THE GOVERNMENT'S POSITION.

Atwell, in his excellent work on Federal Criminal Law, says at page 219, "One of the most useful and comprehensive statutes in the old revision was Section 5440, which is re-enacted in the New Code in Section 37." Atwell was, of course, a district attorney. One can understand the holy joy of a district attorney in contem-

plation of a "useful and comprehensive" statute which enables him to bring to trial for their supposed criminal intentions, crooks whose provable acts have not transgressed the law. But Atwell, at the time of writing his book, (in 1911), could not have realized half the comprehensiveness of Section 37, if the decision herein stands. For under this decision, the statute reaches not only crooks but all persons, foolish, stubborn or merely liberty-loving, who may give the officials of the government trouble of any kind.

When thirty years ago certain persons refused to pay income tax on the ground that the law was unconstitutional, they might, under the decision herein, have been charged with a conspiracy to defraud the United States by interfering with a lawful function, to-wit, the collection of income tax; and had the Supreme Court's decision sustained the tax, they would have been guilty. The same might be said of the North Carolina employers of child labor a few years ago. The railway officials who some years ago refused to obey the Adamson Law until the Supreme Court sustained it, were clearly guilty. It is claimed that certain provisions of the Esch-Cummins law are being disregarded by certain railways as unconstitutional. If so, their officials ought at this moment to be under indictment for conspiring to defraud the United States. Any resistance and almost any kind of objection to a law of questionable constitutionality would be an attempt to defraud the United States. The signers of the Declaration of Independence were guilty not only of treason and rebellion but of conspiracy to defraud the government of Great Britain. Daniel Webster and the New England secessionists during the War of 1812 were in a conspiracy to defraud the United States; likewise,

John Greenleaf Whittier and James Russell Lowell during the War with Mexico; likewise the armies of the Southern Confederacy. They could all have been charged with conspiring to impair, obstruct or defeat functions of the government, in the sense claimed by the government here.

To pursue the matter further, resistance or objection to any bureau or bureau regulation would be "impairing, etc.," a lawful function. Organizations for the benefit of soldiers and other special groups in the community would constantly fall foul of the rule. If the government owned the railroads or other public utility, resistance to any rate schedule on the ground of unfairness or illegality would be a conspiracy to defraud the United States.

It does not require any great imagination to realize the danger to constitutional government in such an interpretation of the conspiracy statute. Almost any kind of agitation against governmental activities, even criticism of them, would lay the author open to at least a *prima facie* charge of conspiracy to defraud the United States. The deadening effect of such a situation is too horrible to contemplate. There would be few men of spirit who would not be on the district attorney's list, and it would be impossible to keep this a "government of law and not of men."

If it should be said that it would be intolerable that persons should be able to interfere with the operation of a law during the period in which its constitutionality was being considered, the answer would be that ample penalties are usually provided, where necessary, to discourage any foolish or insincere raising of constitutional or legal questions. It might further be said that Congress

is not helpless. It can and generally does enact laws to meet situations that may arise. It is not the duty of courts to give unusual and far-fetched meanings to general statutes in order to cover particular situations which Congress either never contemplated or perhaps ignored.

(V d) Fallacy of the Government's Position.

In the case of *Cohens* v. *Virginia,* 6 Wheat., 264, 399, it was said by Chief Justice Marshall, that "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

The facts of *Haas* v. *Henkel* have already been referred to. They have no similarity to the facts here. As stated by Judge Denison in his dissenting opinion below (Rec., p. 43), (referring to *Haas* v. *Henkel*), "It was not claimed in argument or suggested in opinion (unless in the quoted phrase) that a conspiracy to defraud which lacked the element of financial loss, did not still necessarily imply some chicanery. The conduct of Holmes and Haas was thoroughly "crooked," and this connotes fraud in the ordinary sense of that word."

The court therefore may re-examine the entire question of conspiracy to defraud with reference to the facts of this case and, if necessary, modify the definition laid down in *Haas* v. *Henkel.*

(V d 1) Ordinary Meaning of Defraud.

Section 37 of the Penal Code uses the word "defraud" without explanation. In enacting the statute years ago,

Congress certainly did not have before it the meaning deduced by the government in this case from *Haas* v. *Henkel*. Shall the courts at this time by interpretation write something into the statute which was not there?

It is said in *Settle* v. *Van Evrea*, 49 N. Y., 281,

> "A fundamental rule, in the interpretation tion of written laws or instruments of any kind, is to construe them according to the sense of the terms and the intention of the framers of the laws or parties to the instruments. That intention is first to be sought from the words employed, and if the language is unambiguous, the words plain and clear, conveying a distinct idea, there is no occasion to resort to other means of interpretation."

What then is the ordinary use of the word "defraud"? Webster's International Dictionary defines it as follows:

> "to deprive of some right, interest or property by a deceitful device; to cheat; to overreach."

These meanings are sufficient to cover every judicial interpretation of "fraud" or "defraud" with the exception of the decision herein and in the two similar war cases previously referred to.

Prior to these cases, the extreme application of the term "defraud" was perhaps the holding in *Horman* v. *U. S.*, 116 Fed., 350 (C. C. A., 6). In that case it was held that a scheme to obtain money by blackmail, to-wit, by threatening to expose certain alleged criminal conduct of the victim, was a scheme to defraud and that the use of the mails for such a scheme came within Section 215 of the Penal Code. The court in that case said, "A scheme or artifice to defraud is not limited in its

meaning to such as are to be accomplished by means of deception or trickery." The court apparently seemed to think there was no deception or trickery in the scheme. Counsel are disposed to believe that the scheme could fairly have been called a piece of trickery, but passing that question, there can be no doubt but that it was a scheme to "cheat" and that it had in it the elements of "crookedness" and dishonesty, that it was, in a word, "fraudulent."

(V d 2) Lawful Functions of the Government.

Counsel, thus far, have argued the broad principle that the doctrine of the lower court is untenable on fundamental principles without regard to deductions from general statements of law, such as that in *Haas* v. *Henkel*, based on dissimilar facts. Counsel believe, however, that even the language of *Haas* v. *Henkel* has been incorrectly applied here by the government and the majority opinion of the lower court.

The government says this was a conspiracy "to impair, etc., a lawful function of the government, to-wit, registration." To bring this within the *Haas* v. *Henkel* rule, we must interpret it as though it had read "the lawful functions of a department of the government, to wit, the department of military registration." Now what were the functions of the registration officials? The government would argue that the function of these officials was to register every male within the prescribed ages and that the alleged acts of these defendants interfered with this function. But is this accurate?

Ordinarily we might be tempted to say that the function of a prize-fighter is to defeat his opponent. As it is his opponent's function to defeat him, apparently one

or the other will fail to perform his function on this basis. Obviously there is a fallacy somewhere and the fallacy is clearly in the original assumption. It is the aim of the prize fighter to win but not his function. His function is to do everything he is capable of, within the rules, to win. His opponent's efforts thus in no way interfere with his functions.

In a similar way it is a fallacy to argue that opposition to registration was an impairment of the functions of the registration officials as contemplated by *Haas* v. *Henkel*. As in the case of the prize-fighter aim and function are confused. The functions of the registration officials might be said to have been substantially the following:

(1) To register all who presented themselves;

(2) To discover and cause the apprehension of persons seeking to evade the law:

(3) To pass on exemption claims;

(4) To submit their lists to the military authorities.

The defendants interfered with none of the functions of the registration officials. So far as these defendants were concerned, the government received from its officials every service to which it was entitled.

Had the defendants sought to bribe or otherwise cause the registration officials to do less than their duty, this would have been an attempt to impair a lawful function and would have been a fraud on the United States under *Haas* v. *Henkel*, and *would have been a fraud in fact.*

The distinction made herein may be more clearly apprehended by substituting a civil corporation in place of the government. Let us assume that the Steel Trust or the Meat Trust for the purpose of achieving some economy or for the accomplishment of some other pur-

pose of its efficiency department, should call on all its employees to fill out certain registration blanks in which they were required to set forth details as to age, ancestry, religion, previous employment, health, habits of life, etc. This might be likened to the Conscription Act passed by Congress. Every official of the corporation having to do with the registration would correspond to the registration officials under the act of Congress; the body of employees of the corporation would correspond to those liable to the military conscription act. As in the case of the government, the corporation would be entitled to the loyal service of all its employees in its registration department. Any attempt to persuade these employees while remaining in the corporation's employ, to fall short of this loyalty, by either failing to do acts which they were bound to do, or by doing acts contrary to what they were bound to do, would be an attempt to defraud the corporation by depriving it of services to which it was entitled and which it was being led to believe it was getting. However, supposing that some group of the employees or some union representing some of the employees were to issue a statement to the employees setting forth that the corporation had no legal right to make inquisitorial investigations of this character and that all employees who believed in the dignity and manhood of American labor should refuse to obey the orders as to registration. According to the doctrine laid down by the decision below, this would be a conspiracy to defraud the corporation by impairing, obstructing or defeating a lawful function of the corporation. The absurdity of such a claim is too manifest to require argument. On the other hand, there would clearly be an attempt to defraud the corporation if the malcontents were

to bribe the registering officials of the corporation to accept false or incomplete answers or to overlook the failure of certain employees to answer at all. This would be "impairing, obstructing or defeating a lawful function of a department" of the corporation.

On the basis of the foregoing, counsel believe that both law and common sense require the interpretation placed by the government upon the definition in *Haas* v. *Henkel* to be rejected as untenable.

(V d 3) No Attempt in Haas v. Henkel to Define "Fraud."

In conclusion as to *Haas* v. *Henkel*, it may fairly be said that the court was really making no attempt in that case to define "defraud." There could be no question about the fraud there. A fraud was clearly being planned on those dealing in the market with Haas, and the machinery of the government was being dishonestly used to accomplish the fraud. The only question before the court was whether this particular fraud was legally a fraud on the United States, and the court correctly held that, the United States being entitled to have its officials do the things which they were employed to do and which they were supposed to be doing, any scheme which, with fraudulent intent, sought to have them betray or fall short of their duty, was a fraud on the United States. Unfortunately, the language used was capable superficially of being interpreted to mean that fraud was not a necessary element in a conspiracy to defraud the United States.

VI.

The Conspiracy Charge is Inadequate.

Aside from the question of fraud, however, counsel believe that the conspiracy charge itself is defective. An indictment for conspiracy under Section 37, consists of two parts; first, the allegations describing the plan of the conspiracy; second, the allegations as to overt acts. These two parts are necessarily distinct and independent, and each must be complete. The gravamen of the charge is the conspiracy; the overt acts merely comply with the evidential requirements of the statute.

A careful examination of the indictment in this case reveals the fact that the defendants are charged merely with conspiring to print and distribute "handbills, circulars, dodgers and other *literature, composed, printed, intended and designed for the purpose of counseling, etc.,* * * * to evade, and refuse to obey the requirements of said act of Congress." The conspiracy as set forth does not include any particular handbill or other literature for none is alleged either in *haec verba* or even in substance. The overt acts part of the indictment alleges that the printing of a specific handbill was ordered by two of the defendants and that three others of them each distributed a copy, but this circular is in no way referred to in the conspiracy charge as having been agreed on.

What then does the indictment intend to charge? Can it be sustained as a mere charge of intention to print something of a certain tendency without agreeing on anything in particular to be printed? But would this be a completed conspiracy ready for business? Obviously not. Some step would remain to be taken before

there could be anything to act on. The would-be conspirators would have a common idea but no common plan. Any member or members of the group publishing some handbill of their own might be acting on their conception of the idea but they would not be carrying out any plan of the group.

Or does the indictment intend to charge that the defendants actually planned the circular which some of them printed and distributed? It does not say so and criminal indictments must be strictly construed. Furthermore, it has time and again been held that when, in an indictment for conspiracy, the government intends to rely for conviction on a specific document, the document must be set forth "*in haec verba,*" if a copy is available, or in substance, if a copy cannot be obtained. *Hughes Fed. Procedure*, p. 39; *Foster Fed. Practice*, Vol. 2, p. 1668; *U. S.* v. *Noelke*, 1 Fed., 426, 432; *U. S.* v. *Green*, 136 Fed., 618, 643; *U. S.* v. *Watson*, 17 Fed., 146, 149.

Nor can the conspiracy charge be helped out by guesses founded on the overt acts portion of the indictment where the conspiracy charge does not itself refer to the overt acts for definiteness. The case of *Joplin Mercantile Co.* v. *U. S.*, 236 U. S., 531, is directly in point. In that case, the indictment charged a conspiracy to commit an offense "by introducing intoxicating liquor into the Indian country which was formerly Indian Territory, and is now a portion of the state of Oklahoma." The overt acts allegations charged the delivery of liquor in Joplin, Missouri, for transportation into Tulsa, Oklahoma. The court say, at page 535, "that clause of the indictment which sets forth the conspiracy does not in terms allege, as a part of it, that the liquor was to be brought from without the state of Oklahoma; nor does

this clause refer for light upon its meaning to the clauses that set forth the overt acts. Hence we do not think the latter clauses can be resorted to in aid of the averments of the former." And *Joplin Mercantile Co.* v. *U. S.* merely followed the rule laid down in *U. S.* v. *Britton*, 108 U. S., 199, 205.

The validity of this indictment was argued three times before the late Hon. Howard C. Hollister on motion to quash, and three separate opinions were delivered by him (Rec., p. 6, p. 11, p. 12). In his first opinion, Judge Hollister sustained the motion in the following language (Rec., p. 8):

> "The charge does not set out the circular, etc., agreed to be printed and published, nor does it refer to any clause where it may be found, and we have nothing in the charge itself from which to determine whether or not the circular could have the effect alleged or not, whether as to persons within the draft age or as to 'various persons,' whatever that description may mean. The indictment sets out the pleader's conclusion, but fails to set out that from which his conclusion is drawn. The circulars, etc., designed and composed, as set forth, were a part of the conspiracy itself and the charge of conspiracy is not complete until the entire agreement is set forth. Hence it would seem logically, that the first part of the offense—the conspiracy—is not sufficiently alleged. It is true that in that part of the indictment stating the alleged first overt act, we find a printed circular inserted and 'made a part of this indictment,' but there is nothing to show that that circular is the circular, etc., alleged in the charge of conspiracy to have been composed, printed, etc., advising evasion of the draft law."

The government thus had its attention directed to the weakness of this indictment at an early stage. Judge Hollister's opinion would indicate that he expected the government to prepare a stronger indictment (Rec., p. 11). Whether for lack of evidence or for other reasons, the government chose not to change the indictment. Instead, it insisted on a rehearing and persuaded the court to reverse itself. Counsel submit that Judge Hollister was correct in his first opinion and that the objections which he raised to the indictment have not been overcome either by his own subsequent opinions or by the decision of the Circuit Court of Appeals.

VI.

The Indictment and the Free Speech Amendment.

Even if it were to be assumed that this indictment actually charged a conspiracy to print and distribute the specific circular set forth in connection with the first overt act, which it carefully omits to do, and even if the term "defraud" could be stretched to cover frank opposition to activities of the government or its officials, counsel would still maintain that this indictment must fail.

The circular set forth, given its fullest effect, did nothing more than denounce the Conscription Act as a fundamental invasion of the constitutional rights of American citizens, and to call on all who agreed with its principles, to uphold what Daniel Webster called "the dearest right of personal liberty," by refusing to submit to this unconstitutional infringement of vital personal rights. It did not advocate lawlessness of any kind. It merely maintained that, in refusing to register, citizens would be within their constitutional rights and it promised the

financial and moral support of the Socialist Party of Ohio to back them up in this stand.

At the time of its issue, the argument of the circular was at least plausible in its claim that involuntary service in the United States army, particularly in a war on foreign soil, was essentially involuntary servitude, as thoroughgoing in its control of the conduct, habits and life of the individual as any involuntary servitude could possibly be. Six or seven months later, the Supreme Court sustained conscription and the question was closed as a matter of law.

Wherein lay the offense of the circular? Judge Denison in his dissenting opinion below says (Rec., p. 41):

> "The Selective Service Act, so called (Act of May 18, 1917; 40 Stats., 76), and the proclamations pursuant to it required registration on June 5, 1917, of all young men between 21 and 31. The law evidently contemplated a compulsory military service outside the United States. These respondents thought that such requirement was unconstitutional, and that their constitutional right of free speech permitted them to say so. Their ideas were unsound, but it had not then been expressly so decided; and their claims were, in the abstract, at least as plausible as those commonly made, that courts may not adjudge any law invalid as unconstitutional, and that an injunction obstructing what defendants think are their constitutional rights need not be obeyed, and such claims are not punished; but the existing state of war made these respondents' concrete conduct disloyal and intolerable. There was no law directly forbidding it (this was before the Espionage Act of June 15, 1917), and so they were indicted under Sec. 37 of the Penal Code."

In effect, Judge Denison says that no law was violated, but that the conduct of the defendants was "disloyal and intolerable," and that, apparently, Section 37 was stretched to meet what the District Attorney considered the necessities of the occasion. Loyalty and disloyalty are, of course, broad terms and relative in their meaning. The government can punish treason, and treason as an offense is carefully defined. Loyalty is faithfulness to an idea whether that idea is the American government or American principles or something else. The original authors of the circular here undoubtedly believed themselves loyal to American principles of law and freedom as fully as the members of the Second Continental Congress believed themselves loyal to English principles of law and freedom.

Paradox though it may seem, every government owes its virility and strength to the opposition to it which is stirred up when it attempts some far reaching new assumption of power or permits evils to accumulate until they become insufferable. The colonists who refused to obey the "Stamp Act" were true Englishmen and they would have been true Englishmen even had they failed in their contentions, for it was only by opposition of their kind that the merits and demerits of the Stamp act and the philosophy of government that lay behind it, could be tested. The glory of a nation lies not in the meek submission of its subjects to any disposition of their lives and liberties the government may make; it lies rather in the recognition and protection of fundamental individual rights and in the ability of its citizens to assert those rights, when attacked, even against the officials of the government.

The introduction of military conscription into the United States was a tremendous departure from American and English traditions of government. Free governments, we had always fondly believed, had but to call on their citizens and more than enough volunteers would spring up to meet any emergency. Conscription in the Civil War had been tried on a small scale, but it was hateful and unproductive of results. On the continent of Europe it had established itself in countries used to large applications of paternalism and socialism. Was it to be wondered at that the passage of the draft law by Congress should stir up tremendous protest? Probably a majority of the people were against the law. More than a third of Congress opposed it, including many of the leaders and nearly, if not quite, a majority of the President's own party. If, under these circumstances, there had been no protest, would it have been to the credit of America? Would we not have been branded as a race of sheep, humbly bowing to anything government might impose, the Europeanized successors of the individualists of '76 and '61?

Let America be grateful that the protest was made, even though it had to be overridden. In the end, the people of America agreed that the protestants were wrong, that in a tremendous struggle like the World War, the country must become a vast commune in which the lives and liberties of all citizens must be subject to the authority which claims to act for all.

And if, in the next world war, Congress should decide that not only the lives and liberties but even the property of the people should be placed in the communal reservoir, it is to be expected and hoped that there will be some protest, some objection, so that the wisdom or un-

wisdom of such a course can be adequately considered and decided upon; for it is of the essence of free government that it should encourage protest and investigate its grounds rather than that it should make protest impossible and thus deprive itself of the enlightenment which opposition alone can bring.

The first amendment to the Constitution of the United States provides that Congress shall make no law abridging the freedom of speech. It is safe to say that when Congress adopted the conspiracy statute it had not the remotest suspicion that it was interfering with free speech. Yet the government contends in this case that the conspiracy statute prohibited these defendants and others from expressing their arguments against the constitutionality of the system of military conscription.

VIII.

CONCLUSIONS.

On the basis of the foregoing, counsel submit the following conclusions as to the indictment herein:

1st. That the indictment fails to charge any facts constituting fraudulent conduct or attempted fraudulent conduct on the part of plaintiffs in error.

2nd. That fraud is a necessary element in conspiracy to defraud the United States.

3rd. That the definition of "conspiracy to defraud" in *Haas* v. *Henkel* (216 U. S., 462, 479), was never intended to apply to facts like those in this indictment, and does not, in fact, apply to them.

4th. That the conspiracy charge of the indictment fails to charge a completed plan of conspiracy and sets forth merely the conclusions of the pleader.

5th. That the application of the conspiracy statute to this indictment constitutes a violation of the first amendment to the United States Constitution.

6th. That the demurrer to the indictment should have been sustained, and that the judgments heretofore rendered should be reversed and the indictment dismissed.

Respectfully submitted,

ED. F. ALEXANDER,
JOSEPH W. SHARTS,
Counsel for Petitioners.

No. 924 54

Supreme Court of the United States

THOMAS HAMMERSCHMIDT ET AL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the U. S. Court of Appeals for the Sixth Circuit and Brief in Support Thereof.

ED. F. ALEXANDER,
JOSEPH W. SHARTS,
Attorneys for Petitioners.

COURT INDEX PRESS, 640-50 Main Street, Cincinnati—March 1955.

AUTHORITIES CITED.

Supreme Court of the United States

THOMAS HAMMERSCHMIDT, LOTTA BURKE, CHARLES THIEMANN, FRANK REIS, FRED SCHNEIDER, WILLIAM GRUBER, ALEXANDER J. FELDHAUS, JOSEPH GEIER, PHIL ROTHENBUSCH, ARTHUR TIEDTKE, JOHN HAHN and *ALFRED WELKER,*

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari.

To the Honorable Supreme Court of the United States:

Your petitioners, Thomas Hammerschmidt, Lotta Burke, Charles Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander J. Feldhaus, Joseph Geier, Phil. Rothenbusch, Arthur Tiedtke, John Hahn and Alfred Welker, respectfully represent to this Honorable Court:

(a) That at the October term, 1917, an indictment was presented by the grand jury of the Southern District of Ohio, Western Division, charging that these petitioners, and one Walter Gregory, now deceased, on or about

the 27th day of May, 1917, did conspire to defraud the United States (Rec. p. 5) "by impairing, obstructing and defeating a lawful function of the Government of the United States, to-wit, the registration for military service of all male persons between the ages of twenty-one and thirty, both inclusive, as provided by the Act of Congress passed May 18, 1917, entitled 'An Act to authorize the President to Increase Temporarily the Military Establishment of the United States' and the lawful proclamations and regulations promulgated under the provisions of said Act, by printing, or having printed, and publishing, displaying and distributing or having published, displayed and distributed in various places and to various persons in said district, especially to male persons between the ages of twenty-one and thirty, both inclusive, hand bills, circulars, dodgers, and other literature, composed, printed, intended and designed for the purpose of counseling, advising, aiding and procuring said persons, especially said male persons between the ages of twenty-one and thirty, both inclusive, to evade and refuse to obey the requirements of said Act of Congress, by which said Act and the proclamations and regulations promulgated thereunder, said persons were required to present themselves for and submit to registration under the provisions of said Act and the proclamations and regulations promulgated thereunder."

Said indictment further charged the commission of certain overt acts to-wit, (1) the ordering of the printing of a certain circular set forth on page 7 of the printed record filed herewith, (2) the obtaining of 18,000 copies of said circular from the printer, and (3), (4), (5), the distributing of copies thereof to Susan Jeffries, Henry J. Dickhouse and William Steele respectively.

(b) Your petitioners moved to quash said indictment (Rec. pp. 9-11), demurred thereto (Rec. p. 25) and filed a plea in abatement (Rec. pp. 22-24). Said motion to quash and said demurrer set up (1) that said indictment did not set forth facts sufficient to constitute a conspiracy to defraud the United States of America or any offense against the United States; (2) that although said indictment charged a conspiracy to defraud the United States, it nowhere alleged any fraudulent acts on the part of the defendants or other facts indicating fraudulent acts or fraudulent intentions; (3) that said indictment did not set forth any overt acts on the part of defendants fraudulently done by defendants or done in pursuant of any conspiracy to defraud; (4) that said indictment was vague and indefinite and did not inform defendants of the nature and cause of the accusation.

Said motion, demurrer and plea were overruled. (Rec. p. 22, p. 26 and p. 25).

(c) Thereafter, your petitioners entered a plea of not guilty, were tried before Hon. Howard C. Hollister in said District Court of the Southern District of Ohio, Western Division, and on July 24, 1919, were found guilty by a jury with a recommendation of mercy. (Rec. p. 31).

(d) Thereafter, a motion for a new trial (Rec. p. 32). and a motion in arrest of judgment (Rec. p. 34), were filed by your petitioners and, said Hon. Howard C. Hollister having died after said trial without hearing said motions or entering judgment or sentence in said case, said motions were heard by his successor, Hon. John W. Peck, and were by him overruled (Rec., pp. 52, 53), and your petitioners were thereupon sentenced as follows (Rec., pp. 52 and 53):

Thomas Hammerschmidt, United States Penitentiary at Atlanta, Georgia, fifteen (15) months.

Lotta Burke, Missouri State Prison, at Jefferson City, Missouri, fifteen (15) months.

Joseph Geier, United States Penitentiary, Atlanta, Georgia, fifteen (15) months.

Charles Thiemann, United States Penitentiary at Atlanta, Georgia, one year and one day.

Frank Reis, United States Penitentiary at Atlanta, Georgia, one year and one day.

Fred Schneider, United States Penitentiary at Atlanta, Georgia, one year and one day.

William Gruber, United States Penitentiary at Atlanta, Georgia, one year and one day.

Alexander J. Feldhaus, United States Penitentiary at Atlanta, Georgia, one year and one day.

Phil. Rothenbusch, Jail of Hamilton County, Ohio, six (6) months, and pay a fine of One Hundred and Fifty Dollars (150.00) and costs.

Arthur Tiedtke, Jail of Hamilton County, Ohio, Six (6) months, and pay a fine of One Hundred and Fifty Dollars ($150.00) and costs.

John Hahn, Jail of Hamilton County, Ohio, Six (6) months, and pay a fine of One Hundred and Fifty Dollars ($150.00) and costs.

Alfred Welker, jail of Hamilton County, Ohio, Three (3) months, and pay a fine of One Hundred Dollars ($100.00) and costs.

(e) Thereafter, a bill of exceptions was allowed by the court and proceedings in error were instituted in the Circuit Court of Appeals for the Sixth Circuit, which said court, on February 16, 1923, affirmed the conviction of the District Court by a divided vote, Hon. Maurice H. Donahue writing the prevailing opinion in which Hon. Loyal E. Knappen concurred, and Hon. A. C. Denison preparing a dissenting opinion.

(f) Your petitioners present herewith as a part of this petition, a certified copy of the transcript of the record, including all proceedings in said Circuit Court of Appeals.

(g) Your petitioners are advised and believe that said judgment of the United States Circuit Court of Appeals in said case is erroneous and that this Honorable Court should require said case to be certified to it for its determination as provided in Section 240, Judicial Code, for the following reasons.

1. The Circuit Court of Appeals of the Sixth Circuit, by its majority decision, has extended the crime of "conspiracy to defraud," as set forth in Section 37 of the Penal Code, to cover cases where persons combine to oppose the operation of a federal law which they consider unconstitutional.

2. The meaning given to the word "defraud" by the majority opinion of the court below goes beyond any reasonable and accepted meaning of the word as ordinarily used and as presumably contemplated by Congress when the statute was enacted.

3. The said majority opinion, in effect, enacts by judicial decree a new offense against the United States, which enactment in the instant case is *ex post facto*.

4. The said majority opinion on the point in question, is based not on the court's original reasoning but on the following definition of "conspiracy to defraud" given by the Supreme Court in the case of *Haas* v. *Henkel*, 216 U. S., 462, 479, as follows:

> "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government."

5. Counsel believe that the facts of this case and sim-

ilar cases do not fairly come within said definition, and that the Supreme Court never intended in its said decision to extend the meaning of the word "defraud" to cover facts such as are here involved.

6. If the decision of the court below stands as the law of the United States, it means that whenever two or more persons undertake to oppose the operation of a federal law or a federal regulation on legal or constitutional grounds, they become immediately subject to indictment for a conspiracy to defraud the United States. The statute may thus be used as an instrument to prevent the raising of constitutional objections to acts of Congress and may become, under circumstances easily conceivable, an instrument of tyranny.

7. It is the duty of the Supreme Court to make clear and unambiguous the meaning and scope of its aforesaid definition of "conspiracy to defraud," particularly in view of the divided opinion of the Circuit Court of Appeals of the Sixth Circuit.

8. In addition to the foregoing, counsel maintain that the courts below, in sustaining the indictment herein have disregarded the rule in *U. S.* v. *Britten,* 108 U. S., 199, 205, that in an indictment for conspiracy, the conspiratous agreement must be fully alleged and may not be helped out by reference to the overt acts portion of the indictment. In the instance case, the indictment charged only a conclusion as to the intention and purpose of the hand bills, etc. alleged to have been planned, without setting forth copies of the said hand bills or the substance thereof otherwise than in connection with the overt acts.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to

certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said case, entitled Thomas Hammerschmidt and others v. United States of America, No. 3585, to the end that said case be reviewed and determined by this court as provided by Section 240 of the Judicial Code, and that your petitioners may have such other or further relief or remedy in the premises as this court may deem appropriate, and in conformity with said provision of the Judicial Code, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof, may be reversed by this Honorable Court.

The petitioners aforesaid

By JOSEPH W. SHARTS,
ED. F. ALEXANDER,
Their Attorneys.

STATE OF OHIO, MONTGOMERY COUNTY, SS.

Joseph W. Sharts, being first duly sworn, says that he is one of the attorneys of record in the above entitled cause for the petitioners named in the foregoing petition for *writ of certiorari;* that he has read the same and knows that the contents thereof and the facts and matters stated therein are true, as he verily believes, and that this petition is still effective and meritorious in affiant's opinion, and is not intended for delay.

JOSEPH W. SHARTS.

Sworn to before me and subscribed in my presence this 2nd day of March, 1923.

[N. P. SEAL.] DANIEL P. FARRELL.
Notary Public, Montgomery County, Ohio.

SUPREME COURT OF THE UNITED STATES

THOMAS HAMMERSCHMIDT, LOTTA BURKE, CHARLES THIEMANN, FRANK REIS, FRED SCHNEIDER, WILLIAM GRUBER, ALEXANDER J. FELDHAUS, JOSEPH GEIER, PHIL ROTHENBUSCH, ARTHUR TIEDTKE, JOHN HAHN and *ALFRED WELKER,*

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Brief in Support of Petition for Writ of Certiorari.

STATEMENT OF THE CASE.

The first Draft Act was passed by Congress on May 18, 1917, and called for the registration of all male persons between the ages of twenty-one and thirty years on the fifth day of June, 1917. The Act was opposed, before its enactment, by about one-third of the representatives of the people in Congress, and by a very large part of the citizenship of the country, perhaps a majority, on the ground that it was contrary to all principles of American and Anglo Saxon liberty that any government should support itself by the forced military service of

its citizens. After the enactment of the law, it was opposed by two groups of persons— 1st, those who believed that religion, or a law higher than that of man, forbade the compulsion of any individual to take up arms in warfare; 2nd, by those who believed that the Constitution of the United States did not give Congress the power to enforce compulsory military service, particularly in a foreign war. The first group, however conscientious they were, in effect, took a position of wilfully disobeying the law. The main body of the Socialist party of the United States came within the second group. The court will perhaps remember that a number of cases to test the constitutionality of the Draft Act came to the Supreme Court and that the act was sustained by decision handed down January 8th, 1918.

In the city of Cincinnati, the Socialist Party held a municipal nominating convention meeting on Sunday, May 27th, 1917, at which it incidentally provided for the calling of a meeting of protest against the Conscription Act, and for the publication and issuance of a circular in that connection. As a review is asked in this court on the basis of the indictment only, it would be unprofitable at this time to go into the details of the specific action of this meeting of Sunday, May 27th. The evidence is set forth at length in the record. It suffices to say that an agent of the government was admittedly there and that the government, in putting on its case, made no reference to the convention meeting. In its proof, it went simply on the facts that eleven young men had been arrested while distributing or attempting to distribute the anti-conscription circular set up in the indictment and on the alleged but disputed fact that the defendants, Burke and Hammerschmidt, had ordered the printing

of the same. On these bald facts, the government asked the jury to convict all the defendants of a conspiracy to defraud the United States and the jury did so, though apparently, with some doubt in its mind, considering the fact that they remained out three hours and compromised on a verdict of guilty with recommendation of mercy.

ARGUMENT.

1, 2, 3.

Section 37 of the Penal Code, as readopted in 1909, punishes any conspiracy "to commit an offense against the United States or to defraud the United States." In the instant case, the acts are charged solely as a conspiracy to defraud the United States. As shown by the indictment (Rec., p. 5) and by the prevailing and dissenting opinions of the Circuit Court of Appeals, the alleged fraud in this case consisted of planning to publish circulars denouncing the conscription law as unconstitutional and calling upon citizens to maintain their constitutional rights by not obeying it.

Webster's International Dictionary defines the word "defraud" as follows: "to deprive of some right, interest, or property by a deceitful device; to cheat; to overreach." It must be admitted that the alleged fraud in this case could not be brought under any of the foregoing defnitions. Of course, counsel realize the difficulty, even in a dictionary, of setting forth any definition or succession of synonyms which will cover every conceivably possible shade of meaning. The terms "fraud" and "defraud" have given the courts considerable trouble,

but so far as counsel is aware, no act or set of acts not coming fairly under one or the other of the above definitions of Webster has ever been considered sufficient to justify a charge of fraud except in the instant case and in the similar cases of *U. S.* v. *Galleanni*, 245 Fed., 977, and *Firth* v. *U. S.*, 253 Fed., 36 (C.C.A., 4). Excluding the last named cases, the extreme judicial application of the term "fraud" or "defraud" was that made in the case of *Horman* v. *U. S.*, 116 Fed., 350 (C.C.A., 6), where it was held that a scheme to obtain money by blackmail, to-wit, by threatening to expose certain alleged criminal conduct of the victim, was a fraud, and that "a scheme or artifice to defraud is not limited in its meaning to such as are to be accomplished by means of deception or trickery." It will be noticed, however, that while there may not in this case have been deception or trickery in a literal sense (although counsel think the scheme could fairly be called a trick), the scheme was a scheme to cheat and that the elements of dishonesty, of taking advantage, and of "crooked" dealing were involved.

Prior to June 1, 1917, no ordinary person would have suspected that even the most violent open opposition to the government could be punished as a scheme to defraud the United States. Nobody would have dared to say that Congress contemplated the use of the term "conspiracy to defraud" to cover any such conduct. It is noteworthy in this connection that the indictment does not say simply that the defendants conspired to defraud the United States by performing certain acts; the government found it necessary to indicate that it was using the term "defraud" in an artificial meaning by adding the explanatory expression "by impairing, obstructing and defeating a lawful function of the government of the United States (taken bodily from *Haas* v. *Henkel*,

216 U. S., 462, 479), to-wit, the registration," etc. The inference is that if these explanatory words had been left out, nobody would have known what the government meant by charging the acts as a fraud.

It would thus appear that beginning with the year 1917, a new offense against the United States came into existence without any action on the part of Congress, to-wit, the offense of conspiracy to defraud the United States by denouncing an act of Congress. Correspondingly, the defendants, having been arrested before this judicial interpretation of Section 37 had been arrived at, were arrested for a crime which nobody knew existed until after they were charged with it.

4.

The indictment shows on its face that its peculiar application of the term "defraud" rests on an interpretation of a definition of conspiracy to defraud given in the case of *Haas* v. *Henkel*, 216 U. S., 462, 479, by adopting in its body the exact language of the court in that case. The judge of the District Court, in his opinion, adopted this interpretation without reasoning the point, merely saying (Rec., p. 36), "The objections to the indictment are overruled on authority of *Haas* v. *Henkel*, 216 U. S., 462; *U. S.* v. *Galleanni*, 245 Fed., 977; *Firth* v. *U. S.*, 253 Fed., 36 (C.C.A., 4.)" The latter two cases likewise refer to the language of *Haas* v. *Henkel* as binding without consideration of the circumstances. The majority opinion in the instant case similarly rests entirely on the definition in *Haas* v. *Henkel*, although it refers to certain other cases of fraud, to-wit, *Curley* v. *U. S.*, 130 Fed., 1 (C.C.A., 1); *Sugar* v. *U. S.*, 252 Fed., 79 (C.C.A., 6); *U. S.* v. *Sacks*, 257 U. S., 37; *U. S.* v. *Janowitz*, 257 U. S.,

42; *Hormon* v. *U. S.*, 116 Fed., 350; *Edwards* v. *U. S.*, 249 Fed., 686 (C.C.A., 6). But these cases in nowise bear out the extreme interpretation given to *Haas* v. *Henkel.* In every one of them, there existed facts which characterized the acts of defendants as fraudulent and dishonest, just as was the case in *Haas* v. *Henkel.*

Hormon v. *U. S.* has been commented on above. In *Curley* v. *U. S.*, the defendant impersonated an applicant who was supposed to be taking a civil service examination. *Sugar* v. *U. S.* was a case somewhat similar to the case at bar and the reasoning of that case would be inconsistent with the prevailing opinion of the Circuit Court here. The specific question before the court was whether an indictment which charged the defendants in one count with conspiring "to commit an offense against the United States or to defraud the United States" was objectionable as being duplicitous. The court held that the indictment did not set up any facts constituting a conspiracy to defraud and that therefore the use of the words "to defraud the United States" was mere surplusage. Counsel believe that the court in the Sugar case interpreted the term "defraud" in its natural and ordinary sense and by necessary inference, excluded the application of "conspiracy to defraud" from facts like those in the instant case. The cases of *U. S.* v. *Sacks* and *U. S.* v. *Janowitz* dealt with a scheme to have United States War Savings Certificates removed from the non-transferable certificates to which they were attached and affixed to other certificates by the defendants. The case of *Edwards* v. *U. S.* like the case of *Hormon* v. *U. S.* arose under Penal Code, 215 (using the mails to defraud), the fraud there consisting of a scheme to impose upon the public by falsely labeling certain

drug preparations so as to convey the impression that they were manufactured in Europe.

5.

Taking up the definition of "conspiracy to defraud" as given by the Supreme Court in *Haas* v. *Henkel,* it is clear that so far as the facts of that case were involved, "impairing, obstructing or defeating the lawful function of any department of Government" referred not to external opposition to the operation of a law (which Congress could guard against by legislation fitting the case without ambiguity), but to interfering with the workings of the functions of governmental departments by bribing or corrupting employees or otherwise causing these departments to act in a manner contrary to law or to the requirements of the government. Such an interpretation of the court's definition is not only in harmony with the definition as applied to the facts of the case of *Haas* v. *Henkel,* but is in harmony with the ordinary established and anambiguous usage of the term "defraud."

So far as the idea of fraud is concerned, there can be no distinction between fraud against the United States and fraud against a private person or corporation, if the facts are the same. If, for example, a private corporation had issued orders that all its employees should, on a fixed day, fill out certain registration blanks setting forth various facts concerning themselves and their families, and certain of the employees issued a handbill calling on the employees to refuse to register and to stand on their rights, could it be fairly said that this was a conspiracy to defraud the corporation by impairing, etc., one of its functions? Obviously not, for the reason that

there would be involved no artifice, no scheme, no cheating, no overreaching, and no dishonest dealing. On the other hand, if a group of employees were, by bribery or threats, to persuade the officials in charge not to require answers from some of them, or to accept false answers, this would be impairing and obstructing a function of the corporation so as to constitute fraud on the corporation in the sense contemplated by the Supreme Court in its definition in *Haas* v. *Henkel.*

Counsel further believes that even if the language of the definition in *Haas* v. *Henkel,* literally interpreted, could be made to apply to acts such as those alleged in the instant case, the Supreme Court never intended that it should be so applied.

6.

It does not require any great imagination to realize the danger to constitutional government in the interpretation of the conspiracy statute as given by the majority opinion below. If this interpretation had been effective along about the year 1894, when the Cleveland income tax law was passed by Congress, the government could immediately have arrested the persons who arranged to resist the collection, by charging them with a conspiracy to defraud the United States by "impairing, etc., a lawful function of the government," to-wit, the collection of an income tax. Of course, after the income tax was found unconstitutional, the indictment would necessarily have failed, but in the meantime, the weapon might have been very effective. The same might be said of the North Carolina manufacturers who resisted the operation of the Child Labor Statutes. In 1916, a number of

railroad managers decided to test the Adamson act and for some seven or eight months, until the Supreme Court acted, failed to follow its provision. If the interpretation claimed for the definition in *Haas* v. *Henkel* is correct, they were guilty of a conspiracy to defraud the United States by impairing, etc., a lawful function of the United States, to-wit, the regulation of railroads engaged in interstate commerce. Further, in the event that the United States were to operate the railroads or any other public utility, objection to any set of rates or regulations imposed by some government bureau could be treated as a conspiracy to defraud by impairing, etc., the lawful function of a department of the government. Conspiracy to defraud could be made the great catch-all for all troublesome persons whose minds did not run with those of the powers temporarily in control of the government.

If it should be said that it would be intolerable that persons should be able to interfere with the operation of a law during the period in which its constitutionality was being considered, the answer would be that ample penalties are usually provided, where necessary, to discourage any foolish or insincere raising of constitutional or legal questions. It might further be said that Congress is not helpless. It can and generally does enact laws to meet situations that may arise. It is not the duty of courts to give unusual and far-fetched meanings to general statutes in order to cover a particular situation which Congress either never contemplated or perhaps ignored.

7.

In general, it might fairly be said that the majority opinion of the court below held that the facts alleged in

this case, *whether fraudulent or not,* constituted a conspiracy to defraud because of the definition given by the Supreme Court in *Haas* v. *Henkel.* On the other hand, the dissenting opinion held that the facts here did not constitute a conspiracy to defraud, *because they were not fraudulent,* and that the Supreme Court neither by its language in *Haas* v. *Henkel,* nor otherwise, intended that conspiracy to defraud should cover acts not fraudulent.

In view of the foregoing, it would seem to counsel that the Supreme Court which made the definition in *Haas* v. *Henkel* should clear up the interpretation of it.

8.

The main argument of this petition is, of course, as to the definition in *Haas* v. *Henkel* above referred to. It goes entirely to the indictment, without reference to the merits of the facts of the case which were tried out in the courts below. However, it appears to counsel that while the court is considering the indictment, it might consider the question whether, in a charge of conspiracy, it is sufficient to allege that the conspirators sought to accomplish their purpose by literature "composed, printed, intended and designed for the purpose," etc., without apprising the defendants by copy of such literature or by a statement of its substance, of the particular literature charged as offensive. In the opinion of counsel, it appears that this indictment charged nothing more than a conclusion. It would seem axiomatic that the government in proving its case must either offer in evidence the literature or show what the substance of it was. It could certainly not offer testimony simply to the effect

that it was designed, etc., to accomplish a certain purpose. Therefore, if the proof required evidence as to the literature rather than a conclusion as to its purpose and effect, it would seem that the indictment itself should either set forth copies of the alleged offending literature or state its substance so that the defendants might be informed and so that the court before proceeding to trial might determine whether the alleged literature really was of the character claimed in the conclusion of the indictment.

As counsel understand the case of *U. S.* v. *Britton*, 108 U. S., 199, 205, this indictment did not properly charge a conspiracy. The defendants, it will be particularly noted, are not charged with conspiring to publish the circular set up in the overt acts portion of the indictment, and the court will not help out the charge of conspiracy by inferences from the overt acts charged.

CONCLUSION.

For the reasons herein set forth, counsel respectfully submit that this case ought to be reviewed by the Supreme Court.

Ed. F. Alexander,
Joseph W. Sharts,
Attorneys for Petitioners.

No. 91-[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS HAMMERSCHMIDT ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1922.

THOMAS HAMMERSCHMIDT ET AL., petitioners, v. UNITED STATES OF AMERICA. } No. 924.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

STATEMENT.

Petitioners were convicted under an indictment charging them with conspiring to defraud the United States through obstructing and defeating the function of the Government in securing registration of persons eligible to military duty. The Circuit Court of Appeals, in an opinion that needs no elaboration here, affirmed the judgment of conviction. One of the judges of that court, however, dissented upon the ground now made the basis of the petition for certiorari here under discussion, viz, that the acts of petitioners could not defraud the United States.

The majority opinion seems to satisfactorily dispose of the question, and we need here only point out what we conceive to be the error in the dissenting opinion. That opinion states that the following is the question in the case:

> Thus the question is "Does one who stands upon his supposed right to refuse to obey an unconstitutional law thereby 'defraud' the United States, if it turns out that the law was valid?"

The question on the record here before the court is not so narrow. The real question is whether a conspiracy organized for the express purpose of depriving the Government, through the distribution of circulars and other literature containing gross misstatements of fact, of the service of those upon the country must rely in the hour of national peril does not, if consummated, thereby defraud the United States in the broad sense in which the term defraud is used in Section 37 of the Criminal Code. There seems to be no escape from the controlling effect here of the decision of this court in *Haas* v. *Henkel*, 216 U. S. 462, 477–478. Directly in point is *United States* v. *Galleanni*, 245 Fed. 977. See also *Horman* v. *United States*, 116 Fed. 350; certiorari denied, 187 U. S. 641.

Two trial and two appellate court judges have upheld the judgment of conviction in this case, and the reasons advanced in the single dissenting opinion do not make out a case deserving of review on certiorari.

It is, therefore, respectfully submitted that the petition should be denied.

JAMES M. BECK,
Solicitor General.
JOHN W. H. CRIM,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

APRIL, 1923.

C

No. 254.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

THOMAS HAMMERSCHMIDT ET AL., PETITIONERS,

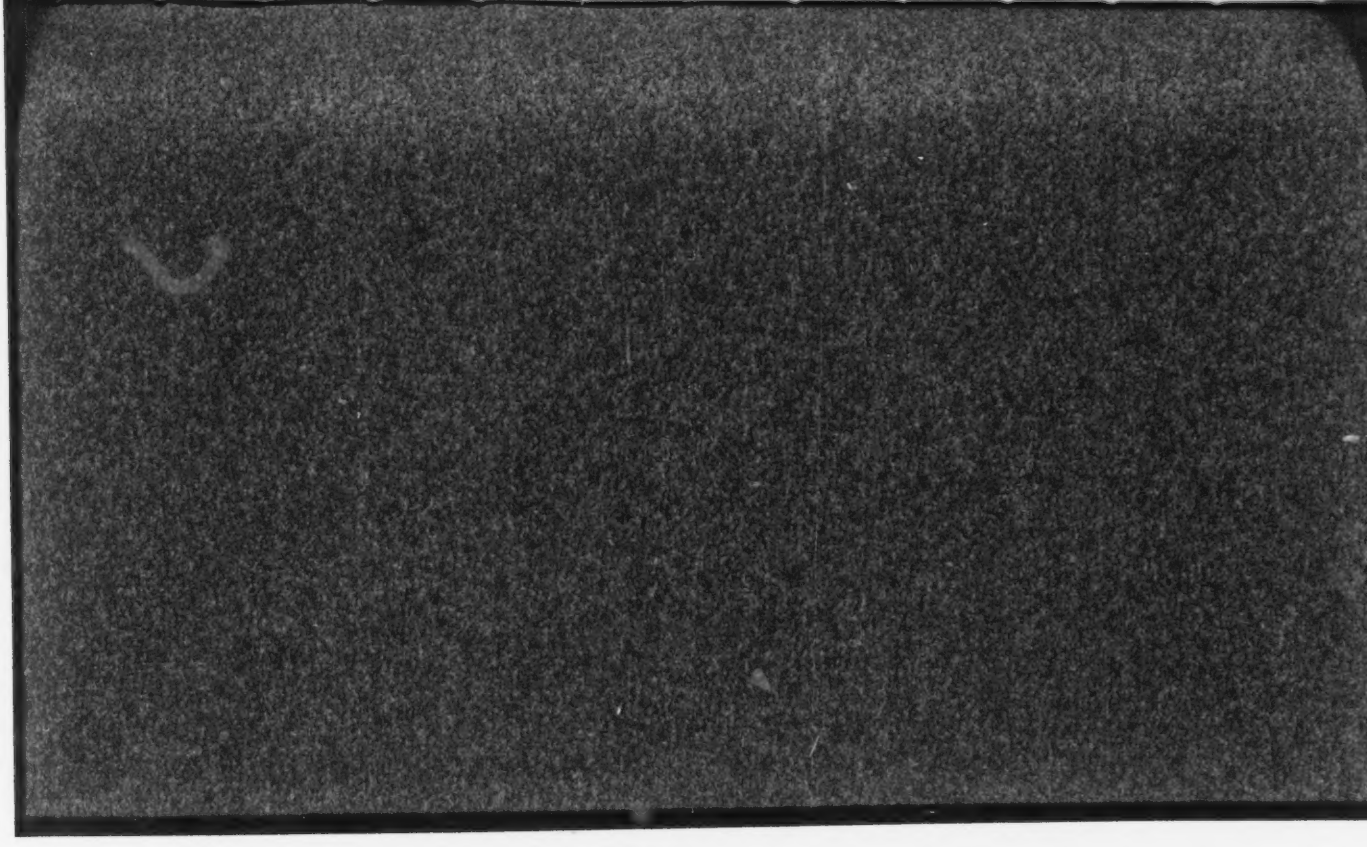
v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

WASHINGTON: GOVERNMENT PRINTING OFFICE 1924



In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THOMAS HAMMERSCHMIDT ET AL., petitioners,
v.
THE UNITED STATES OF AMERICA.
No. 254.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

Petitioners were convicted (R. p. 14) in the District Court of the United States for the Western Division of the Southern District of Ohio, under an indictment (R. p. 1) in one count, charging with great particularity and detail that petitioners at a specified time and place wilfully and unlawfully conspired "to defraud the United States by impairing, obstructing and defeating a lawful function of the Government of the United States," to wit, the function of registering for military service all male persons between the ages of twenty-one and thirty as required by the Selective Service Act of May 18, 1917. It charged that such conspiracy was to be accomplished

"by printing, or having printed, and publishing, displaying and distributing or having published, displayed and distributed in various places and to various persons in said district, especially to male persons between the ages of twenty-one and thirty, both inclusive, handbills, circulars, dodgers, and other literature, composed, printed, intended and designed for the purpose of counselling, advising, aiding and procuring said persons—to evade, and refuse to obey the requirements of said Act of Congress * * *." The commission of five overt acts is charged and each is described in detail. The first relates to the act of ordering from the Queen Card Company fifty thousand handbills, an exact copy of which is inserted (R. p. 2) and "made a part of this indictment." The remaining four have to do with the receiving and distributing of the aforesaid handbills to various named persons.

The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of conviction and rendered an exhaustive opinion sustaining the indictment (R. p. 36). Judge Denison dissenting (R. p. 41) upon the ground that the acts of petitioners did not constitute a fraud upon the United States.

QUESTIONS.

The cause comes before this court on writ of certiorari granted at the October Term, 1922, based on the sole ground that the indictment is insufficient. Petitioners contend firstly, that the the facts of this case as disclosed by the record do not amount to a

conspiracy to defraud the United States; secondly, that if they do, such conspiracy is inadequately charged, and thirdly, that if the indictment be otherwise good it constitutes a violation of the First Amendment to the Constitution.

ARGUMENT.

I.

The facts charged in the indictment constitute a conspiracy to defraud the United States.

Section 37 of the Penal Code makes it a felony to conspire to defraud the United States in any manner or for any purpose.

The purpose of the statute is to secure the wholesome administration of the laws and affairs of the United States.

United States v. *Moore*, 173 Fed. 122.
United States v. *Stone*, 135 Fed. 392.

It is not limited to conspiracies to deprive the United States of property or money, but is broad enough to cover any conspiracy to defraud the United States of any right, including the obstruction of the lawful functions of any department of the Government.

Haas v. *Henkel*, 216 U. S. 462;
Hyde v. *Shine*, 199 U. S. 62, 78 et seq.;
United States v. *Foster*, 233 U. S. 515;
United States v. *Keitel*, 211 U. S. 370, 393;
United States v. *Sacks*, 257 U. S. 37;
United States v. *Janowitz*, 257 U. S. 42;
Firth v. *United States*, 253 Fed. 36;
United States v. *Galleanni*, 245 Fed. 977,

and the conspirators may not escape the consequences of their agreement to do an illegal thing because they did not resort to deception or trickery.

> *Haas* v. *Henkel, supra;*
> *United States* v. *Slater,* 278 Fed. 266, 269;
> *Edwards* v. *United States,* 249 Fed. 686;
> *Horman* v. *United States,* 116 Fed. 350.

In *United States* v. *Galleanni, supra,* the facts were one with the case at bar. In discussing the sufficiency of count two, charging a conspiracy to defraud the United States, District Judge Morton said at page 978:

> The United States was entitled to have persons subject to registration perform their duty and register according to law; and a conspiracy to prevent their doing so was a conspiracy to deprive the United States of a right to which it was entitled, and therefore to defraud it, within the meaning of Section 37,

citing *Haas* v. *Henkel, supra,* and *Curley* v. *United States,* 130 Fed. 1.

In *Firth* v. *United States* (C. C. A. 4th Cir.) supra, the defendants were charged with conspiracy to defraud the United States by obstructing the Draft Law, the indictment being in substantially the same language as that used in the case now under consideration. The court held that such a conspiracy was one to defraud the United States by obstructing a function of the Government.

The Selective Service Act, among other things, required that all male citizens between the ages of

twenty-one and thirty should register for service in the military and naval forces of the United States.

In the face of this statute petitioners caused to be printed with the idea of distributing to the public at large several thousand handbills attacking the Draft Act and counselling or commanding to "Refuse to Register for Conscription." The indictment avers that a number of them were distributed. The conduct of petitioners constituted a conspiracy to defraud the United States in that the intention and necessary effect of their agreement and acts was to obstruct and defeat the purpose of a measure enacted by Congress for the preservation of the Government. Such conduct was not within the criminal provisions of the Selective Service Law (Sections 5 and 6), and at the time of the commission of the alleged offense the Espionage Act had not been enacted into law.

The United States Attorney who drafted the indictment in the case at bar found in the decisions of this court a definition of the scope of Section 37 of the Penal Code which seemed to apply to the precise situation with which ne was confronted. On page 479 of the opinion rendered in *Haas* v. *Henkel*, *supra*, Mr. Justice Lurton, speaking for the court, said:

> But it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.

The indictment herein is drawn in the language above quoted.

A majority of the Circuit Court of Appeals, after full consideration of the law and the facts of the case at bar, reached the conclusion (R. p. 37–39) that the indictment charged a conspiracy to defraud the United States.

It is argued (Brief, p. 15) that petitioners did not conspire to impair the functions of "the department of military registration." The indictment is not so narrow. It charges a conspiracy to impair the *function of registration*. Such function is a mutual and reciprocal obligation, requiring (1) that persons within the terms of the Draft Law present themselves for registration, and (2) that the Government officials examine applicants and make a record of their qualifications for military service. The duties of registration officials are a part of such function only. The term obviously refers to the *entire activity of registration* and includes whatever is done by the applicants as well as the acts of Government employees who examine applicants and make a record of the information so obtained. It is, therefore, fallacious to contend that there was no interference with the function of registration because petitioners did not hinder or obstruct registration officials in the performance of their office.

Judge Denison in a dissenting opinion (R. p. 41) states that the following is the question in the case:

> Thus the question is "Does one who stands upon his supposed right to refuse to obey an

> unconstitutional law thereby 'defraud' the United States, if it turns out that the law was valid?"

The question on the record here before the court is not so narrow. The real question is whether a conspiracy organized for the express purpose of depriving the Government, through the distribution of circulars and other literature containing gross misstatements of fact, of the services of those upon whom the country must rely in the hour of national peril, does not, if consummated, thereby defraud the United States in the broad sense in which the term defraud is used in Section 37 of the Penal Code.

II

The indictment is good in form.

The sole objection to the form of the indictment is that a copy of the handbills which petitioners were charged with having distributed is not set forth verbatim in the conspiracy part of the indictment, as distinguished from that part describing overt acts.

It is true that an indictment for conspiracy must charge the unlawful agreement complete and distinct in itself, and the conspiracy averments will not be aided by a description of the overt acts by which it was attempted to accomplish its object.

Joplin Mercantile Co. v. *United States*, 236 U. S. 531;

United States v. *Richards*, 149 Fed. 443;

But in charging a conspiracy the tenor of an instrument need not be set out verbatim.

In *United States* v. *Grunberg*, 131 Fed. 137, Circuit Judge Putnam, speaking for the court says on page 139:

> In the Federal courts, at least, it is not necessary to allege the tenor of an instrument unless it touches the very pith of the crime itself, as forgery or counterfeiting. The tenor of an instrument is never alleged in conspiracy indictments of the class at bar, where, as we have said, the setting out of the means is only incidental to the description of what is the substance of the offense.

The following cases are directly in point.

> *United States* v. *Golleanni*, *supra*.
> *United States* v. *Winslow*, 195 Fed. 578, 582.
> *United States* v. *Heinze*, 161 Fed. 425, 428.
> *Pooler* v. *United States*, 127 Fed. 509, 517-518.
> *United States* v. *French*, 57 Fed. 382.

The case of *Pierce* v. *United States*, 252 U. S. 239, furnishes a recent example of the practice of merely describing seditious documents in an indictment for conspiracy. This was a prosecution for conspiracy to commit the offense of causing disloyalty in the military and naval forces of the United States, denounced in Section 3 of the Espionage Act. Among other means, it was charged that the conspiracy was to be accomplished by the distribution of a seditious pamphlet entitled "The Price We Pay." As regards setting forth the publication complained of, the

pleader followed the plan upon which the indictment in the case at bar is drawn; that is, the character and effect of the pamphlet are described in the charge of conspiracy and it is set out verbatim in another part of the indictment. The substance of the second count is set forth on page 241 of the opinion and is approved by this court on page 243.

III.

The First Amendment.

Petitioners allege that their conviction was in violation of the First Amendment, which protects free speech. The handbills here involved contain language not less objectionable than that condemned in *Schenck* v. *United States*, 249 U. S. 48, in which Mr. Justice Holmes, speaking for the court, said, at page 52:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.

See also *Frohwerk* v. *United States*, 249 U. S. 204.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

JAMES M. BECK,
Solicitor General.
EARL J. DAVIS,
Assistant Attorney General.
CLIFFORD H. BYRNES,
Special Assistant to the Attorney General.
February, 1924.

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HAMMERSCHMIDT ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 254. Argued April 29, 30, 1924.—Decided May 26, 1924.

1. Section 37 of the Criminal Code (Rev. Stats., § 5440) punishing conspiracy "to defraud the United States in any manner or for any purpose," does not embrace a conspiracy to defeat the purpose of the Selective Draft Act by inducing persons to refuse to register under it. P. 185.
2. To "defraud" the United States means to cheat the Government out of property or money, or to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. P. 188.
3. But mere open defiance of the governmental purpose to enforce a law by urging those subject to it to disobey it, is not a "fraud" in this sense. *Id.* *Haas* v. *Henkel*, 216 U. S. 462, explained; *Horman* v. *United States*, 116 Fed. 350, limited.

287 Fed. 817, reversed.

CERTIORARI to review a judgment of the Circuit Court of Appeals affirming a conviction and sentence in a prosecution for conspiracy to defraud the United States by dissuading persons, by handbills, etc., from registering for military service.

Mr. Ed. F. Alexander, with whom *Mr. Joseph W. Sharts* was on the brief, for petitioners.

Mr. Assistant Attorney General Davis, with whom *Mr. Solicitor General Beck* and *Mr. Clifford H. Byrnes*, Special Assistant to the Attorney General, were on the brief, for the United States.

The facts charged in the indictment constitute a conspiracy to defraud the United States.

The purpose of the statute is to secure the wholesome administration of the laws and affairs of the United States. *United States* v. *Moore*, 173 Fed. 122; *United States* v. *Stone*, 135 Fed. 392.

It is not limited to conspiracies to deprive the United States of property or money, but is broad enough to cover any conspiracy to defraud the United States of any right, including the obstruction of the lawful functions of any department of the Government. *Haas* v. *Henkel*, 216 U. S. 462; *Hyde* v. *Shine*, 199 U. S. 62; *United States* v. *Foster*, 233 U. S. 515; *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Sacks*, 257 U. S. 37; *United States* v. *Janowitz*, 257 U. S. 42; *Firth* v. *United States*, 253 Fed. 36; *United States* v. *Galleanni*, 245 Fed. 977. The conspirators may not escape the consequences of their agreement to do an illegal thing because they did not resort to deception or trickery. *Haas* v. *Henkel, supra; United States* v. *Slater*, 278 Fed. 266; *Edwards* v. *United States*, 249 Fed. 686; *Horman* v. *United States*, 116 Fed. 350.

The Selective Service Act, among other things, required that all male citizens between the ages of twenty-one and thirty should register for service in the military and naval forces of the United States.

In the face of this statute petitioners caused to be printed, with the idea of distributing to the public at large, several thousand handbills attacking the Draft Act and counseling or commanding to "refuse to register for conscription." The indictment avers that a number of them were distributed. The conduct of petitioners con-

stituted a conspiracy to defraud the United States in that the intention and necessary effect of their agreement and acts was to obstruct and defeat the purpose of a measure enacted by Congress for the preservation of the Government. Such conduct was not within the criminal provisions of the Selective Service Act (§§ 5 and 6), and at the time of the offense the Espionage Act had not been enacted.

It is argued that petitioners did not conspire to impair the functions of "the department of military registration." The indictment is not so narrow. It charges a conspiracy to impair the function of registration. Such function is a mutual and reciprocal obligation, requiring (1) that persons within the terms of the Draft Law present themselves for registration, and (2) that the government officials examine applicants and make a record of their qualifications for military service. The duties of registration officials are a part of such function only. The term obviously refers to the entire activity of registration and includes whatever is done by the applicants as well as the acts of government employees who examine applicants and make a record of the information so obtained. It is, therefore, fallacious to contend that there was no interference with the function of registration because petitioners did not hinder or obstruct registration officials in the performance of their office.

The real question is whether a conspiracy organized for the express purpose of depriving the Government, through the distribution of circulars and other literature containing gross misstatements of fact, of the services of those upon whom the country must rely in the hour of national peril, does not, if consummated, thereby defraud the United States in the broad sense in which the term defraud is used in § 37 of the Penal Code.

[The form of the indictment, and a defense based on the First Amendment were also discussed.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a review by certiorari of the conviction of thirteen persons charged in one indictment with the crime of violating § 37 of the Penal Code. The charge was that the petitioners wilfully and unlawfully conspired to defraud the United States by impairing, obstructing and defeating a lawful function of its government, to wit: that of registering for military service all male persons between the ages of twenty-one and thirty as required by the Selective Service Act of May 18, 1917, c. 15, 40 Stat. 76, through the printing, publishing and circulating of handbills, dodgers and other matter intended and designed to counsel, advise and procure persons subject to the Selective Act to refuse to obey it. A demurrer to the indictment was overruled and trial and conviction followed. By exception and assignment of error the question is properly made whether a crime described as above can be said to be a conspiracy to defraud the United States. The Sixth Circuit Court of Appeals affirmed the conviction. 287 Fed. 817.

The indictment was framed and the argument of the Government in support of the conviction is based on the language of this Court in *Haas* v. *Henkel,* 216 U. S. 462, 479, construing § 5440, Rev. Stats. (now § 37 of the Penal Code) which reads as follows:

"If two or more persons conspire . . . to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable," etc.

The opinion was delivered by Mr. Justice Lurton and the words relied on are:

"The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing

or defeating the lawful function of any department of Government."

This language it is contended necessarily embraces a conspiracy to defeat the selective draft by inducing the persons required to register under it to defeat its purpose by refusing to register.

We think the words relied on can not be given such a wide meaning when we consider the case to which they were applied, and when we replace them in the context. The Court was dealing with an appeal in a *habeas corpus* case to test the validity of an order of removal of the appellant under § 1014, Rev. Stats. The main question was whether the indictments under which the removal was ordered charged an offense against the United States. They charged two sets of conspiracies. One was that the defendant with two others, one an associate statistician in the Department of Agriculture, conspired to obtain secret official information which the statistician in violation of his official duty was to give out to his co-conspirators concerning the cotton crop reports in advance of the time they were to be published according to law; another was that the statistician was to falsify one of the reports of which his associates were to be advised in advance ; another was that the defendant and one associate were to bribe the statistician to make the false report and publish it in advance. The second conspiracy involving the defendant, the statistician, and other persons was similar in detail to the first. All of the information in advance of the official publication was to be used for speculative purposes in the open market. The opinion describes the official machinery in the Agricultural Department for acquiring the information upon which the cotton reports each month were based, and shows that they were approved by the Secretary, and that by regulation the employees were required to keep them and their details secret until duly published, and points out that

they were of great value and vitally affected the market price of the cotton crop.

The appellant in that case urged that the conspiracy to defraud the United States, punished in the section, must result in financial loss to the Government. It was this contention which the Court was meeting, and upon this point it said:

"These counts do not expressly charge that the conspiracy included any direct pecuniary loss to the United States, but as it is averred that the acquiring of the information and its intelligent computation, with deductions, comparisons and explanations involved great expense, it is clear that practices of this kind would deprive these reports of most of their value to the public and degrade the department in general estimation, and that there would be a real financial loss. But it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result", and then follows the sentence already quoted upon which the Government relies.

It is obvious that the writer of the opinion and the Court were not considering whether deceit or trickery was essential to satisfy the defrauding required under the statute. The facts in the case were such that that question was not presented. The deceit of the public, the trickery in the advance publication secured by bribery of an official, and the falsification of the reports, made the fraud and deceit so clear as the gist of the offenses actually charged that their presence was not in dispute. The sole question was whether the fraud there practised must have inflicted upon the Government pecuniary loss, or whether its purpose and effect to defeat a lawful function of the Government and injure others thereby was enough. That was all that Mr. Justice Lurton's words can be construed to mean. The cases in which this case has been referred to involved unquestioned deceit or false pretense, and it was only cited in them to the point that financial

loss of the Government is not necessary to violate the section. *United States* v. *Foster*, 233 U. S. 515, 526; *United States* v. *Barnow*, 239 U. S. 74, 79. See also *United States* v. *Plyler*, 222 U. S. 15, in respect to § 5418, Rev. Stats.

To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention. It is true that the words " to defraud " as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes. One would not class robbery or burglary among frauds. In *Horman* v. *United States*, 116 Fed. 350, § 5480, Rev. Stats., as amended March 2, 1889, c. 393, 25 Stat. 873, making it a crime to devise any scheme or artifice to defraud by use of the mails and opening correspondence with any person, and to mail a letter in execution thereof, was held to be violated by the sending of a letter threatening to blacken the character of another unless that other paid the blackmailer money. It was held that the word " scheme " in that section was of broader meaning and did not necessarily involve trickery or cunning in the scheme, if use of the mails was part of it; that intent to defraud in such a statute was satisfied by the wrongful purpose of injuring one in his property rights. The question had much consideration. The decision, however, went to the verge and should be con-

fined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose. Section 5480 has since been again amended to make its scope clearer. Its construction in the *Horman Case* can not be used as authority to include within the legal definition of a conspiracy to defraud the United States a mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it.

We think the demurrer to the indictment in this case should have been sustained and the indictment quashed.

Judgment reversed.